No. 80-443

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HEWETT M. REEVES,
Petitioner,

versus

INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION,
Respondent,

RAY MARSHALL, Secretary of Labor, United States Department of Labor,
Intervenor.

On Petition for a Writ of Certiorari to The United States Court of Appeals For the Fifth Circuit

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PETITION FOR CERTIORARI

LEROY H. SCOTT, JR.
MECOM & SCOTT
310 Ricou Brewster Bldg.
Shreveport, LA 71101
Telephone: (318) 425-4433

Attorney of Record
for Petitioner

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 - 504/822-1611

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeal was correct in limiting "wages" under 29 U.S.C. 203(m) to employer *furnished* facilities, excluding *personal* expenses *reimbursed* by the employer (board, lodging, laundry, etc.) from the definition of "wages."

2. Whether an employee illegally discharged under 29 U.S.C. 215(a)(3) should have annual pay increases credited to him in calculating lost wages, when the annual pay increases sought are less than the admitted personnel policies of the employer.

3. Should the calculation of liquidated damages on wages lost because of an illegal discharge be based on the gross amount of lost wages prior to deducting the amount earned in other employment after the discharge?

4. Are the public interest purposes of the Wage and Hour Act thwarted by the award of clearly inadequate attorney's fees where the statute provides for mandatory "reasonable attorney's fees?" 29 U.S.C. 216(b)

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Intervenor.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

PETITION FOR CERTIORARI

Petitioner, Hewett M. Reeves, prays that a writ of certiorari issue to review the judgment and the opinion of the United States Court of Appeals for the Fifth Circuit in the above entitled case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 616 F.2d 1342 and is reprinted in Appendix A hereto at pages 1a-28a, infra.

The District Court for the Western District of Louisiana opinion and judgment is noted only at 84 L.C. 33,710 and is reprinted in full in Appendix D hereto at pages 46a-50a, infra. Inasmuch as that opinion partly affirmed the recommendations and findings of the United States Magistrate acting as a Special Master, the opinion of the Magistrate is reproduced in Appendix C hereto at pages 31a-45a, infra.

An earlier opinion of the United States District Court for the Western District of Louisiana on the issue of professional, executive, and/or administrative exemption, reported at 357 F.Supp. 295 (W.D. La. 1973), is not reproduced in the Appendix as the exemption question is not involved in this application and is no longer relevant. International Telephone & Telegraph Corporation (hereinafter, ITT) has now acquiesced in the judgment by depositing $155,405.58 less Social Security and Withholding taxes in the registry of the District Court. This did not include lower court or appellate costs or interest on the judgment following its rendition on November 15, 1977. Their motion to so deposit is reproduced in Appendix G hereto at pages 55a-60a, infra, without the attachments.

JURISDICTION

The judgment of the Court of Appeals was rendered on May 15, 1980. Plaintiff's application for a rehearing was denied on June 23, 1980. (See Appendix B) Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1). The basis of jurisdiction of the Court of Appeals was 28 U.S.C. 1291. The basis of jurisdiction in the District Court was 29 U.S.C. 216(b).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. 216(b) is lengthy and is found in Appendix F. The pertinent part thereof, however, is:

> ". . . . . Any employer who violates the provisions of section 15(a)(3) of the act shall be liable . . . . . including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages . . . . ."

29 U.S.C. 203(m) is lengthy and is found in Appendix F, infra, but the pertinent part is:

> ". . . 'Wage' paid to an employee includes the reasonable cost . . . of furnishing such employee with board, lodging, or other facilities . . . ."

29 C.F.R. 778.217(d) is lengthy and is found in Appendix F. Its pertinent part, however, is:

> ". . . . If the employer reimburses the employee for expenses normally incurred by the employee for his own benefit, he is, of course, increasing the employee's regular rate thereby, and employees normally incur expenses in travelling to and from work, buying lunch, paying rent and the like. If the employer reimburses him for these normal everyday expenses, the payment is not excluded from the regular rate as 'reimbursement for expenses' . . . . . the amount paid to the employee enters into the regular rate of pay . . . . . "

STATEMENT OF THE CASE

Plaintiff was employed by defendant from May, 1965 through August, 1967 as an installer of microwave systems, with the title of microwave field engineer. His compensation rate was $8,400.00 per year plus reimbursement for personal expenses, averaging $980.00 per month. During this period, plaintiff worked many overtime hours and was paid for only some of these. Plaintiff regularly complained of not being paid properly. On August 28, 1967, he filed a complaint with the Wage and Hour Division of the Department of Labor. Although Reeves had been given excellent evaluation and fitness reports, ITT discharged him on the follow-

ing day for "poor performance." Reeves then filed this action charging ITT with unlawful discharge under 29 U.S.C. 215(a)(3) requesting unpaid wages, liquidated damages, attorney fees, lost wages because of the illegal discharge, interest and costs.

ITT originally claimed Reeves was an exempt professional, then later claimed he was an exempt administrative employee and still later claimed he was an exempt executive. The case was tried piecemeal with the court rendering a decision rejecting ITT's claim of exemption on April 27, 1973. 357 F.Supp. 295.

Further proceedings found the Secretary of Labor as Intervenor to assist plaintiff. The United States Magistrate was appointed to take evidence and make recommendations on quantum.

Following a somewhat complex procedural history, none of which is relevant at this time, but which is covered fully in the Court of Appeals opinion, the Magistrate found Reeves entitled to $22,164.28 unpaid wages and liquidated damages, $6,134.48 as damages for unlawful discharge, and $25,000.00 as attorney's fees with the observation that these were inadequate. The District Court increased the lost wages for illegal discharge for the years 1967 through 1974 (The last testimony was taken in January, 1975) to $39,081.46 and increased the attorney's fees to $35,000.00 without comment as to whether this was to re-

flect the fee between January, 1975 and the date of judgment (November, 1977), or whether it was merely to increase the fee found by the Magistrate as being inadequate. ITT has contended in brief that it was to reflect the time spent between January, 1975 and November, 1977, and plaintiff accepts this contention for the purpose of this petition. The District Court calculated Reeves' lost wages due to his illegal discharge at his average rate of pay for his period of employment rather than at his final rate, and gave no annual incremental increases as per ITT's admitted personal policy although reinstatement was ordered at current rates, and with all benefits that he would have received but for the illegal discharge. All parties appealed.

The Court of Appeal affirmed the trial court's judgment on liability and reinstatement, but increased the damages for lost wages and attorney's fees, as follows:

$ 22,164.28	unpaid wages and liquidated damages (unchanged)
$ 35,000.00	attorney's fees (as fixed by the trial court)
$ 5,000.00	attorney's fees for the appeal
$ 93,241.30	back pay for lost wages from 1967-1974, plus liquidated damages (increased from $39,081.46)
$155,405.58	

Federal jurisdiction in the court of first instance was based on 29 U.S.C. 216(b).

REASONS FOR GRANTING THE WRIT

1. In rejecting plaintiff's claim under 29 U.S.C. 203(m), the decision below has created a loophole for employers never previously available.

29 U.S.C. 203(m) provides in pertinent part:

> "Wage paid to any employee includes the reasonable cost . . . to the employer of furnishing such employee with board, lodging or other facilities . . . ."

By interpreting the above section to apply only "to employer furnished facilities and not to reimbursed out-of-pocket personal expenses," the decision below ignores 29 C.F.R. 778.217(D) which provides in pertinent part:

> ". . . . if the employer *reimburses* the employee for expenses normally incurred by the employee *for his own benefit he is, of course, increasing the employee's regular rate thereby* and employees normally incur expenses in *travelling to and from work, buying lunch, paying rent* and the like. If the employer reimburses him for these *normal everyday expenses,* the payment is not excluded from the regular rate as 'Reimbursement for expenses' . . . . the amount

paid to the employee enters into the regular rate of pay . . . . " (Emphasis supplied.)

The Court of Appeal recognized the plaintiff was paid an average of $980.00 per month for purely personal expenses (page 2a, fn 1 and page 23a) but excluded this amount because it was "reimbursed" rather than "furnished." We contend this is a distinction without a difference, and creates a loophole where none existed before.

If this figure had been used in determining Reeves' "regular rate", his regular rate would have been greater by some $3.77 per hour with a large consequent effect on unpaid overtime, liquidated damages and wages lost by his illegal discharge. Thus an injustice has been done.

This application of 29 U.S.C. 203(m) has never been ru'ed on by this court. It is an important part of the law and needs to be addressed.

2. Employees illegally discharged should be made whole and employers need to know that an illegal discharge will be expensive.

This case has been going on since September, 1967, now beginning its 14th year. Even though the present opinion covered only through 1974 (the last testimony

was in January, 1975, and the case has been under consideration or on appeal ever since), it is obvious that inflation has had a tremendous impact. In calculating lost wages, the court granted a credit to the employer for any wages that the employee actually earned elsewhere. The problem is, the subsequent wages are earned in an inflated economy so the employer gets more credit than is reasonable. Only by giving the employee his lost annual wage increases is this corrected. The trial court gave no reason, and the Court of Appeal rejected these as being speculative, but this is not realistic when the personnel policy of the employer is shown by the record. This is necessary to place the employee in the position he would have occupied if he had not been illegally discharged. *Albermarle Paper Co. v. Mood*, 422 U.S. 405 (1975); *Mitchell v. De Mario Jewelry*, 361 U.S. 288 (1960).

3. The decision below conflicts with the statute.

The statutory liability of an employer for an illegal discharge is clearly fixed by 29 U.S.C. 216(b).

> ". . . . . Any employer who violates the provisions of section 15(a)(3) of this Act *shall be liable* for . . . . *payment of wages lost and an additional amount as liquidated damages* . . . . " (Emphasis ours)

Against this liability is credited the wages earned by the employee in other employment in the interim. This is a jurisprudential rule, there being no mention of it in the statutes. The Court of Appeal made an inadvertent error in calculation when it deducted the wages Reeves earned after discharge from the wages he would have earned with ITT *before* determining liquidated damages. The offending employer thus gets a two dollar credit on its statutory liability for each dollar the employee earns. This is not in keeping with the rules pronounced by this court requiring simple words to be given their usual and ordinary meanings. *Tennessee Coal, Iron & R. Co. v. Muscoda Local 123*, 321 U.S. 590 or the long standing rule that the Act is to be liberally construed. *Mitchell v. Lublin, McGaughy & Associates*, 358 U.S. 207.

The liability of the employer for liquidated damages becomes fixed at the time he fails to pay the wages due. *Brooklyn Savings Bank v. O'Neal*, 324 U.S. 697; *Overnight Motor Co. v. Missel*, 316 U.S. 572. Mitigation should only apply against the liability.

This is the only way to keep the employee from losing $2.00 for every $1.00 he earns.

4. An adequate attorney fee is required by the Act and the award of a plainly inadequate fee thwarts the public interest purposes of the Act by discouraging the bringing of Wage & Hour suits.

Private litigation is essential to the enforcement scheme of the Act and private litigants have been characterized as having the role of 'private Attorney General' in advancing the public purposes of the Act.

We believe it is self evident that the statutory mandate of a reasonable attorney fee is not met when the Magistrate himself recognized that the fee as set was inadequate. $25,000.00 for some 2,000 hours extending over an eight year period is not corrected by awarding $35,000.00 for some 3,000 hours extending over a 10 plus year period. This court has noted that an attorney's fee must constitute fair compensation for services. *Greenburg v. Arsenal Bldg. Corp.*, 324 U.S. 697.

Neither $12.50 per hour nor $17.50 per hour can possibly be "adequate" and as such is contrary to law and thwarts the public interest purposes of the Act by discouraging litigation against rich and powerful defendants. This is the essence of an abuse of discretion.

CONCLUSION

The combination of the above four (4) reasons advanced for granting the writ of certiorari demonstrates collectively such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

Respectfully submitted,

LEROY H. SCOTT, JR.
MECOM & SCOTT
310 Ricou Brewster Building
Shreveport, Louisiana 71101
Attorney for Petitioner

CERTIFICATE

I hereby certify that three true and correct copies of the foregoing petition for Writ of Certiorari this day have been served by mail, postage prepaid, properly addressed to Sidney E. Cook, Cook, Clark, Egan, Yancey and King, 600 Commercial National Bank Building, Shreveport, LA 71101; Donald S. Shire, Associate Solicitor, Office of the Solicitor, U.S. Department of Labor, 2000 Constitution Ave., N.W., Room N2620A, Washington, D.C.; and Gordon E. Jackson, 5705 Stage Road, Suite 195, Memphis, TN 38134.

I further certify all parties required to be served have been served.

Shreveport, Louisiana, this the ____ day of September, 1980.

Leroy H. Scott, Jr.
310 Ricou Brewster Bldg.
Shreveport, Louisiana 71101
(318) 425-4433
Of Counsel

APPENDIX A

Hewett M. REEVES,
Plaintiff-Appellant,
Cross-Appellee,

versus

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION,
Defendant-Appellee,
Cross-Appellant,

Ray Marshall, Secretary of Labor,
United States Department of Labor,
Intervenor-Appellant,
Cross-Appellee.

No. 78-1286

United States Court of Appeals,
Fifth Circuit.

May 15, 1980.

Appeals from the United States District Court for the Western District of Louisiana.

Before GOLDBERG, FRANK M. JOHNSON, Jr. and HATCHETT, Circuit Judges.

HATCHETT, Circuit Judge.

An employee, Hewett M. Reeves, instituted this action in September, 1967, to recover unpaid wages and liquidated damages allegedly due him from International Telephone and Telegraph Corporation (IT&T) under the Fair Labor Standards Act (Act), 29 U.S.C. §§201-219. The Secretary of Labor (Secretary) subsequently intervened under section 11(a) and section 17 of the Act. By appeal and cross-appeal, the parties seek review of the district court's judgment ordering reinstatement and awarding $96,245.74 to claimant for unpaid wages, liquidated damages, back pay and attorney's fees. We affirm, the judgment on liability and reinstatement, but increase the damages awarded for back pay and attorney's fees.

FACTS

Nature of Employment.

In May, 1965, Reeves was employed by IT&T as a microwave field engineer at a compensation rate of $8,400 per year.[1] In that capacity, he traveled to contract sites in remote areas of the world installing and testing microwave equipment. In conducting his duties, Reeves followed prescribed procedures and standards

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1 Reeves also received reimbursements averaging $980 per month for travel, lodging, eating and other personal expenses incurred while on business with the company.

in the utilization of complex measuring devices to ensure that equipment installed performed within a predetermined range of tolerance. It was Reeves' responsibility, as an employee whose primary duties were performed outside the supervisory presence of his employer, to maintain and report hourly work records. These records were maintained primarily for billing purposes and, as claimant contends, to form the basis for an accurate calculation of compensable overtime hours.

During his period of employment, Reeves regularly lodged complaints with supervisors and colleagues over what he considered to be a failure on IT&T's part to adequately compensate him for overtime hours reported. On August 28, 1967, Reeves formalized his grievance by filing a complaint with the Wage and Hour Division of the Department of Labor. The following day, August 29, 1967, Reeves was terminated from his employment at IT&T.

Procedural History.

Reeves instituted this action with his timely complaint in federal court charging IT&T with unlawful discharge under section 15(a)(3)[2] and requesting un-

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2 29 U.S.C. §215(a)(3) [§15(a)(3) of the Act] provides as follows:
(a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person—

. . . . .

(3) to discharge or in any other manner discriminate against any employee because such employee has filed

paid wages and liquidated damages computed from an estimated average workweek of approximately 75 hours. Claiming that Reeves was an exempt employee working for the company in a bona fide executive, administrative, or professional capacity as described in 29 U.S.C. §213(a)(1)[3], IT&T denied the charges.

On April 27, 1973, the district court ruled against IT&T on the exemption question and appointed a United States Magistrate to take evidence and make recommendations on the quantum issue. *Reeves v. International Telephone & Telegraph,* 357 F.Supp. 295 (W.D. La. 1973). In the opening hearings before the magistrate, IT&T moved to dismiss Reeves' action under section 15(a)(3) on the grounds that the court lacked jurisdiction under the Act to entertain a private civil action to recover damages for discharge under that provision. In written support of its motion, IT&T maintained that only the Secretary of Labor was authorized under the Act to seek relief. Hearings before the magistrate were stayed, pending a ruling by the district court on the motion to dismiss. That ruling came on July 26, 1973,

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any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee. . . .

3 29 U.S.C. §213(a)(1) provides:
(a) The provisions of section 206 . . . and section 207 of this title shall not apply with respect to—
(1) any employee employed in a bona fide, executive, administrative, or professional capacity. . . .

when the district court denied the motion "as having been filed too late and having further delayed the trial of this case." Four weeks later, the Secretary petitioned for intervention under section 11(a) of the Act. The Secretary filed with the petition a complaint seeking equitable redress on behalf of Reeves for employer violations under section 15(a)(3). The district court granted the motion for intervention, and quantum hearings before the magistrate were reinstituted.

Magistrate's Report and District Court Judgment.

In his quantum report filed on September 9, 1977, the magistrate concluded that IT&T unlawfully discharged Reeves and willfully withheld overtime wages during the period of his employment. Accordingly, he recommended a judgment immediately reinstating Reeves and awarding him appropriate back pay, unpaid wages and attorney's fees. Calculating the award based on a 60 hour workweek at an average straight time hourly wage of $4.31 per hour, the magistrate determined that Reeves was entitled to $22,164.28 as unpaid wages and liquidated damages, and $6,134.48 back pay and diminished earnings.[4] An additional $25,-

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4 The magistrate's computations are explained in the following excerpt from the quantum report:

> The record shows that plaintiff worked a total of 118 weeks with an additional two weeks vacation. During his periods of employment he was paid at the rate of $4.04 an hour, $4.33 an hour, and $4.57 an hour. Thus, his straight time hourly wage averaged $4.31 per hour. Under the Act, he was allowed to work only forty hours

000 for attorney's fees brought the magistrate's total recommended award to $53,298.76. Reimbursed expenses were disallowed.

The district court increased the back pay award to reflect the amount owed for years 1967 through 1974

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per week without overtime compensation. In most instances, especially while in the field, plaintiff's work week averaged far greater than forty hours and sometimes, almost doubled that figure. We find, therefore, that his average work week was sixty hours, or a twenty-hour average of overtime. This gives a total of 2,360 overtime hours. The record shows he was compensated by defendant for straight time of 966 hours, thus revealing a total of 1,394 hours not compensated by either straight time or time and one-half as required by the Act. One and one-half for overtime calculated upon his regular hourly wage is $6.46. This amounts to $9,005.24. Moreover, defendant owes one-half additional time for the 966 hours for which plaintiff was paid straight time. This amounts to (966 X $2.15) a total of $2,076.90, which added to the $9,-005.24 gives a total of $11,082.14. Plaintiff, then, is entitled to receive as liquidated damage, double the latter figure, or $22,164.28.

We accept the figure submitted by defendant, at page 97 of its brief, its summation being the sum of $4,134.48, as his diminished earnings brought about by his unlawful discharge. To this we add the sum of $2,000 as damages caused by his discharge, in accordance with jurisprudence. Thus, the total amount of back pay and liquidated damages, together with damages for his unlawful discharge, amounts to the sum of $28,298.76.

($39,081.46)[5] and increased the attorney's fees to $35,000. In all other respects the magistrate's recommen-

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5 The district court arrived at the $39,081.46 figure through the following computation.

BACK PAY

Projected Average Annual Rate of Pay of Hewett M. Reeves:

	Year	Plaintiff's Earnings	Owed Plaintiff by Defendant
	1967		
52 wks. x 40 hrs. = 2080 hrs. at $4.31 =	$ 8,964.80		
52 wks. x 20 O.T. =	6,718.40		
	$15,683.20		
Less last earnings with ITT in 1967	9,500.00		
	$ 6,183.20	$ 1,307.72	$ 4,875.48
	1968		
Average earnings	$15,683.20	8,360.00	7,323.20
	1969		
Average earnings	$15,683.20	8,840.00	6,843.20
	1970		
Average earnings	$15,683.20	11,285.47	4,397.73
	1971		
Average earnings	$15,683.20	9,395.80	6,287.40
	1972		
Average earnings	$15,683.20	14,569.00	1,114.20
	1973		
Average earnings	$15,683.20	7,442.95	8,240.25
	1974		
Average earnings	$15,683.20	15,715.77	—
			$39,081.46

dations were adopted. Immediate reinstatement was ordered and damages for Reeves were assessed at $96,-245.74.[6] Each party finds error in this judgment.

ISSUES

IT&T contends that the district court erred in (1) asserting jurisdiction under the Act; (2) adjudicating Reeves's non-exempt status; (3) finding an unlawful discharge; (4) calculating damages and attorney's fees; and (5) excluding key defense witnesses. Reeves contests the adequacy of damages awarded on three levels: (a) quantum of attorney's fees; (b) denial of reimbursement expenses; and (c) computation based on a 60 hour workweek. The Secretary defends jurisdiction and urges a "make whole" back pay award calculated on the basis of a higher projected income than that utilized by the district court. We will address the issues in the sequence provided by IT&T, discussing the Secretary's and Reeves' claims as they logically present themselves.

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6 The district court summarized the award in his final order as follows:

Straight time and overtime owed by defendant to plaintiff plus liquidated damages	$22,164.28
Back pay owed by defendant to plaintiff for years 1967 through 1974	39,081.46
Attorney's fee	35,000.00
	$96,245.74

I. JURISDICTION

IT&T rests its jurisdictional challenge on the following argument:[7]

(1) In 1967, when the claimant instituted this suit, the Act did not authorize a private right of action for damages for the wrongful discharge of an employee. Standing to raise the section 15(a)(3) violation rested solely with the Secretary of Labor, who did not file suit at that time. *Powell v. Washington Post Co.*, 267 F.2d 651 (D.C. Cir. 1959).

(2) From the earliest pre-trial stipulation in 1969, the employer has challenged the court's jurisdiction over the unlawful discharge claim. Before April, 1973,

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7 Federal courts have always had "jurisdiction" to provide remedies for retaliatory discharge in actions brought by the Secretary. For this reason, the issue might more accurately have been framed as a challenge to the procedural capacity of the employee to bring a private action to remedy an unlawful discharge. Since we merely set forth the argument as it was presented to us in the briefs, we retain IT&T's characterization of the problem as jurisdictional. We have no serious difficulty with the terminology in any event. The critical question in a procedural capacity or standing challenge is whether the plaintiff possesses sufficient status and stake in the outcome "to warrant *his* invocation of federal-court jurisdiction." *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 260-61, 97 S.Ct. 555, 561, 50 L.Ed.2d 430 (1977); *Singleton v. Wulff*, 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976); *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). It is not inappropriate, therefore, to assert that a court is without "jurisdiction" to address the claims of a party which lacks the procedural capacity to sue.

the district court limited the scope of his judicial inquiry to a resolution of the exemption issue. For this reason, the employee's challenges to jurisdiction were not lodged in a formal motion to dismiss until after that date. The district court erred in not dismissing the unlawful discharge action in response to the challenges set forth in the pre-trial stipulations and later in the motion to dismiss.

(3) The Secretary first attempted to intervene in August, 1973, four weeks after IT&T moved to dismiss the action and nearly six years after the original complaint was filed. The Secretary was barred from intervening at this time by virtue of the statute of limitations governing actions under section 17 of the Act. Section 17 adopts as a limitation on injunctive proceedings the statutory time bar imposed in section 6 of the Portal-to-Portal Act, 29 U.S.C. §§251-262. That section limits Secretarial enforcement to within two years after the cause of action accrued, or within three years if the violation was willful. In either case, the Secretary's six year delay in proceeding to enforce the Act was time barred by statute. Even discounting the statute's effect, the Secretary was prohibited by the doctrine of laches from intervening some six years after suit was filed.

(4) Because intervention was untimely, the Secretary's action could not create an independent basis for jurisdiction over the unlawful discharge claim.

(5) With no private right of action available and with no legitimate basis for Secretarial intervention, the district court was without jurisdiction and should have dismissed the unlawful discharge claim in 1973.

(6) The district court's wrongful failure to dismiss in 1973 cannot form the basis for jurisdiction in 1977. Congressional creation of a private right of action in 1977 for recovery under section 15(a)(3) cannot form the basis for jurisdiction. The proposition that a court must apply whatever law is in effect at the time a decision is rendered is inapplicable here. Although the decision was rendered after the amendment creating the private right of action, a correct ruling in 1973 would have forever foreclosed the unlawful discharge claim. The claimant should not be rewarded for the court's erroneous ruling in 1973, which kept viable an otherwise illegitimate claim.

While IT&T's argument is an appealing one, its analysis does not withstand close scrutiny. First, the record does not support IT&T's contention that jurisdiction over the unlawful discharge was challenged in pre-trial stipulations from 1969 to 1971.[8] The only

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8 Our discussion does not contradict the well-established rule that jurisdictional challenges may be raised at any time. Fed.R.Civ.P. 12(h)(3); *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507 (5 Cir. 1980); *Mansfield, Coldwater & Lake Michigan Railway v. Swan*, 111 U.S. 379, 4 S.Ct. 510, 28 L.Ed. 462 (1884). We do not question the district court's authority to rule on the jurisdictional challenge at any stage. It is necessary to determine *when* the claim was first brought before the district court, however, because only when the claim is properly raised does the court have a duty to address the challenge. That determination bears upon a critical issue in this appeal — the timeliness of the Secretary's intervention.

basis for IT&T's position is the general claim appearing in each stipulation that: "plaintiff has no remedy for his discharge." We do not view this as a challenge, informal or otherwise, to Reeves' jurisdictional right to bring his claim for unlawful discharge before the district court. Our reluctance to so construe the phrase is further justified by the recognition that each of the stipulations proclaims that no jurisdictional questions were raised by either Reeves or IT&T.

The jurisdictional challenge to Reeves' unlawful discharge claim was first presented to the district court in the motion to dismiss filed on July 23, 1973. IT&T conceded at oral argument that only when a claim is adequately raised does a trial court have a duty to rule on the challenge. We conclude that the district court had no duty to address the jurisdictional point until after the motion to dismiss was filed in July, 1973.

Having made this determination, we reject IT&T's claim that the Secretary's intervention was untimely. Rule 24(b) of the Federal Rules of Civil Procedure permits "timely" intervention where an applicant's claims contain common questions of law or fact with the main action. By the express terms of Rule 24, motions for permissive intervention are addressed to the sound discretion of the district court. *United States v. Marion County School District*, 590 F.2d 146 (5th Cir. 1979); *United States v. Allegheny-Ludlum Industries, Inc.*, 553 F.2d 451 (5th Cir. 1977). We will not overturn a determination on inter-

vention absent an abuse of that discretion. *See, Henry v. First National Bank of Clarksdale,* 595 F.2d 291 (5th Cir. 1979); *United States v. Marion County School District; Korioth v. Briscoe,* 523 F.2d 1271 (5th Cir. 1975). IT&T insists that by permitting intervention nearly six years after the action was instituted, the district court abused its discretion. An "absolute measure of timeliness," however, is of little significance in determining the propriety of intervention under Rule 24(b). *Stallworth v. Monsanto Co.,* 558 F.2d 257 (5th Cir. 1977); *Diaz v. Southern Drilling Corp.,* 427 F.2d 1118 (5th Cir. 1970). We have before recognized that intervention is permissible "months or even years after the original filing of the suit 'where the substantial litigation of the issues had not been commenced when the motion to intervene was filed.' " *Smith Petroleum Service, Inc. v. Monsanto Chemical Co.,* 420 F.2d 1103, 1115 (5th Cir. 1970). Moreover, in exercising its discretion the district court must "put into the balance against the movant its prior opportunities to assert its position." *United States v. Marion County School District,* at 148. In this case, the Secretary moved to intervene shortly after the question of Reeves' standing as a private party to assert the unlawful discharge claim was put in issue by IT&T's formal motion to dismiss. IT&T has not demonstrated that the intervention caused undue delay or prejudice in the federal action. *McDonald v. E. J. Lavino Co.,* 430 F.2d 1065 (5th Cir. 1970). We conclude that the application for intervention was timely under Rule 24(b), Fed.R.Civ.P.

IT&T also asserts that the Secretary was barred from filing his complaint in intervention under the statutory limitations period set forth in section 6 of the Portal-to-Portal Act and made applicable in 29 U.S.C. §217. These sections place a maximum three year limitations period on suits to enforce any cause of action "for unpaid minimum wages, unpaid overtime compensation, or liquidated damages" under the Act. *Unexcelled Chemical Corporation v. United States*, 345 U.S. 59, 73 S.Ct. 580, 97 L.Ed. 821 (1953). The Secretary's complaint in intervention was limited to the enforcement of a cause of action for Reeves' unlawful discharge under section 15(a)(3) of the Act. He did not seek redress for unpaid overtime compensation or liquidated damages. The limitation provision of section 255 therefore does not apply to the Secretary's action in equity to enforce section 15(a)(3) of the Act. Nor does the doctrine of laches prohibit the Secretary's intervention. That doctrine does not apply as a defense against agency action to vindicate public rights. *Weiszmann v. District Engineer, U.S. Army Corps of Engineers*, 526 F.2d 1302 (5th Cir. 1976); *United States v. State of Florida*, 482 F.2d 205 (5th Cir. 1973); *Chromcraft Corp. v. EEOC*, 465 F.2d 745 (5th Cir. 1972).

Finally, we reject IT&T's contention that the 1977 amendments did not extend to Reeves a private right of action for unlawful discharge. Private actions for discriminatory discharge were denied in this circuit prior to the amendment to section 216(b). *See, Martinez v. Behring's Bearings Service, Inc.*, 501 F.2d 104 (5th Cir.

1974). In 1977, however, that section was amended to authorize private suits for unlawful discharge "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." The question we must answer is whether passage of the amendment during the pending action operated to extend to Reeves a private right of action which he did not have at the outset of his suit. In resolving the issue, we find persuasive the reasoning of the Sixth Circuit in *Bush v. State Industries, Inc.*, 599 F.2d 780 (6th Cir. 1979). In *Bush*, an employee's pre-amendment action for retaliatory discharge was dismissed in district court for failure to state a claim upon which relief could be granted. Subsequent to the filing of Bush's appeal with the circuit court, Congress amended the Act to provide a private right of action for violations of section 15(a)(3). Citing the "well-established principle" that, barring manifest injustice or express statutory proscription, "a court is to apply the law in effect at the time it renders its decision," the court held the 1977 amendments applicable to Bush's pending case. *Bush v. State Industries, Inc.*, at 786; *Bradley v. School Board of the City of Richmond*, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974). The court in *Bush* summarized its holding as follows:

> When §16(b) of the Act was amended, subsequent to the filing of this action by Bush, it created a private cause of action for enforcement of the rights protected by §15 of the Act. Applying the law in effect at the time of our

> decision, we hold that Bush has an express right to maintain this cause of action. Thus, any question as to whether an implied right of action existed was mooted by the 1977 amendments to the Act.

599 F.2d at 787.

We apply the same rationale to hold that Reeves is entitled to seek redress under section 15(a)(3), where the Act was amended during the pendency of the suit to create a private right of action under section 16(b).[9] We further observe, as did the court in *Bush*, that amendments such as those to section 16(b), which are procedural and affect only remedies, are generally applicable to pending cases. *Bush v. State Industries, Inc.; Mahroom v. Hook*, 563 F.2d 1369 (9th Cir. 1977); *United States v. Blue Sea Line*, 553 F.2d 445 (5th Cir. 1977); *see Pedreyra v. Cornell Prescription Pharmacies, Inc.*, 465 F.Supp. 936 (D.C. Colo. 1979).

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9 IT&T argues that this case is distinguishable from *Bush*, because here the statutory period had run prior to the amendments. This identical claim, however, was raised and rejected in *Bush*. There, the court held that the existence of federal subject matter jurisdiction under 28 U.S.C. §1333 eliminated the limitations problem by tolling the statute upon filing of the claim. Our determination that the statutory period of 29 U.S.C. §255 does not apply to the Secretary's claim under section 15(a)(3), renders unnecessary a decision on the federal subject matter issue.

II. EXEMPTION

For the reasons set forth in the district court's thorough analysis on this issue, we reject IT&T's claim that Reeves should have been adjudicated an exempt employee under 29 U.S.C. §213(a)(1). *See, Reeves v. International Telephone & Telegraph Corp.*, 357 F.Supp. 295 (W.D. La. 1973).

III. UNLAWFUL DISCHARGE

We find adequate evidence in the record to support the district court's determination that Reeves was discharged in retaliation for the filing of his complaint for alleged overtime violations with the Department of Labor. During his employment Reeves had complained regularly to supervisors and colleagues about not being properly compensated for overtime work. In 1967, IT&T established a policy prohibiting payment, including compensation at straight time rates, for overtime work. Although Reeves had been given excellent evaluations and fitness reports,[10] IT&T discharged him

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10 The following excerpts from written performance evaluations are illustrative of the appraisals Reeves received from supervisors during his employment at IT&T.

For the period ending July 7, 1966:

> Mr. Reeves' technical knowledge and ability has proven to be excellent and he has batted 1,000 on his complaints and reports . . . In my opinion, Mr. Reeves is the best RF man we have within our organization. This opinion is shared by . . . [the] most senior microwave systems man

for "poor performance" the day after he lodged his complaints with the Wage and Hour Division of the Department of Labor. The record shows that IT&T had been apprised of Reeves' wage complaint with the Department of Labor. Having reviewed the factual basis for the finding of unlawful discharge we have no definite and firm conviction that a mistake was committed. We therefore affirm on this issue, Rule 52(a), Fed.R.Civ.P., *Inter-Cities Navigation Corp. v. United States*, 608 F.2d 1079 (5th Cir. 1979); *Stegmaier v. Trammell*, 597 F.2d 1027 (5th Cir. 1979).

IV. DAMAGES AWARD

Unpaid Wages.

Under the Act, an employee who brings suit for unpaid overtime compensation bears the burden of proving, with definite and certain evidence, that he performed work for which he was not properly compensated. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946); *Marshall v. Dallas Independent School District*, 605 F.2d 191 (5th Cir. 1979); *Johnson v. Dierks Lumber & Coal Co.*, 130 F.2d 115 (8th Cir. 1942). Inaccurate wage and hour information, however, is not always fatal to a claim for minimum wage or

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For the period from 1967 to May 1968:

> Mr. Reeves' performance on this project has been characterized by others as being one of very high efficiency . . . Mr. Reeves continues to be one of the most capable RF individuals within the installation and service organization.

overtime compensation under the Act. Where the inaccuracy is due to the employer's failure to keep adequate records as required by statute,[11] imprecise evidence on quantum can provide a "sufficient basis" for damages. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. at 687, 66 S.Ct. at 1192; *Marshall v. Mammas Fried Chicken, Inc.*, 590 F.2d 598 (5th Cir. 1979); *Hodgson v. Jones*, 434 F.2d 1061 (5th Cir. 1970). Under these circumstances, we have "in effect ordered the fact finder to do the best he could in assessing damages." *Mitchell v. Riley*, 296 F.2d 614, 616 (5th Cir. 1961). As the Supreme Court observed in *Anderson v. Mt. Clemens Pottery Co.*:

> The solution . . . is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contem-

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11 29 U.S.C. §211(c) provides as follows:

> Every employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or orders thereunder.

> plated by the Fair Labor Standards Act. In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

328 U.S. at 687-688, 66 S.Ct. at 1192.

The unpaid wages awarded by the fact finder in this case reflect a conscientious adherence to the rule enunciated in *Anderson v. Mt. Clemens*. The record supports the magistrate's finding that IT&T did not keep adequate records and that employees were ordered to report incomplete and deflated figures on overtime hours. Moreover, IT&T failed to produce any pertinent records in accordance with discovery orders for certain periods in 1967.

Reeves introduced what he termed a "running total" of hours worked that he apparently kept in his mind during his employment. According to Reeves, he worked approximately 3100 uncompensated hours for IT&T. From this figure, Reeves estimates an average workweek of 74.5 hours. Reeves first testified to the running total in 1973. At that time, he conceded that the totals corresponded to the rough computations of his subconscious mind. Expressly cognizant of his duty under the circumstances to premise an award "upon as close an approximation as possible," the fact finder based his calculations on an average workweek of 60 hours.[12] We are satisfied that the 60 hour workweek represents a fair and "just" approximation under the facts presented and within the guidelines for determination observed in other inadequate company records cases. *See, Anderson v. Mt. Clemens; Mitchell v. Riley; Mitchell v. Mitchell Truck Line, Inc.*, 286 F.2d 721 (5th Cir. 1961). For this reason, we reject Reeves' and IT&T's claim that the resulting unpaid overtime award was clearly erroneous. *See, Weisel v. Singapore Joint Venture, Inc.*, 602 F.2d 1185 (5th Cir. 1979); *Bunn v. Central Realty of Louisiana*, 592 F.2d 891 (5th Cir. 1979).

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12 The average 60 hour workweek computed over Reeves' term of employment resulted in a total of 2,360 overtime hours, 966 of which were compensated by IT&T at the undisputed straight time rate. When the additional overtime wages ($2.15) are added for those 966 hours and the full time and a half rate ($6.46) is calculated for the remaining 1,394 overtime hours, this results in a total unpaid overtime damages award of $11,082.14.

Liquidated Damages.

Citing its alleged good faith belief that Reeves was an exempt employee under 29 U.S.C. §213(a)(1), IT&T argues that there is no basis for the additional assessment of liquidated damages under section 216(b) of the Act. We disagree. Section 11 of the Portal-to-Portal Act, imposes upon an employer seeking to escape liquidated damages the plain and substantial burden of proving that its violation was "both in good faith and predicated upon such reasonable grounds that it would be unfair to impose upon him more than a compensatory verdict." *Barcellona v. Tiffany English Pub, Inc.*, 597 F.2d 464, 468 (5th Cir. 1979). IT&T has not offered sufficient evidence to demonstrate that its failure to pay overtime wages in accordance with the Act was in reasonable good faith. As decisions have shown, the presumption of willfullness stands, absent positive and compelling proof of good faith. It is not enough, for instance, to plead and prove ignorance of the wage requirements. Knowledge will generally be imputed to the offending employer. *Marshall v. A & M Consolidated Independent School District*, 605 F.2d 186 (5th Cir. 1979). Nor does the complete ignorance of the possible applicability of the Act shield the employer from liability for liquidated damages. *Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139 (5th Cir. 1972). Good faith requires some duty to investigate potential liability under the Act. *Barcellona v. Tiffany English Pub, Inc.*

Lack of good faith is demonstrated when an employer "knows, or has reason to know, that his conduct is *governed by* the [Act]." *Brennan v. Heard*, 491 F.2d 1, 3 (5th Cir. 1974). Because we find substantial evidence to conclude that IT&T "knew or suspected that [its] actions might violate the [Act]," we uphold the district court's award of liquidated damages.[13] *Coleman v. Jiffy June Farms*, at 1142; *Pearce v. Wichita County, City of Wichita Falls, Texas, Hospital Board*, 590 F.2d 128 (5th Cir. 1979).

Back Pay Award.

Reeves decries the failure of the district court to add to his projected annual earnings an amount equivalent to the $980 per month he received as reimbursed expenses during his employment period at IT&T. According to Reeves, reimbursements constitute recoverable wages under 29 U.S.C. §203(m). That section defines "wages" to include the reasonable cost of furnishing board, lodging, or other facilities if they are customarily furnished by the employer to his employees. We construe this section to apply to employer furnished facilities, and not to reimbursed out-of-pocket personal ex-

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13 The fact finder was justified in concluding from a number of factors that IT&T knew or should have known it was violating the overtime provisions of the Act. These factors include: the company's instructions not to report overtime hours, the willful discharge of Reeves; supervisors' statements that employees would have to realize they would be working uncompensated overtime hours; and the uncooperativeness of IT&T during discovery. Additionally, as the district court aptly concluded and as we have so held, Reeves was not an exempt employee under the Act.

penses incurred by employees during their business travels. 29 U.S.C. §207(e)(2).[14]

In calculating annual earnings, the court based its figure of $15,683.20 on Reeves' average hourly rate ($4.31) during his employment with IT&T. The Secretary argues that the calculation should have been based on the hourly wage Reeves was making upon termination. The Secretary also asserts that the back pay award is inadequate because the district court failed to consider probable pay increases for the years 1967-1975.

We agree with the Secretary that in order to reasonably restore the employee "to the same situation he would have occupied if he had not been discharged," the award must be based on the rate of pay Reeves was receiving upon termination. *Goldberg v. Bama Manufacturing Corp.*, 302 F.2d 152, 156 (5th Cir. 1962). The district court did not abuse its discretion, however, in refusing to consider possible pay increases from 1967 to 1975. Because of the speculative nature of that determination, we believe it rested within the sound exercise of the district court's discretion "to decide what measure of damages is appropriate." *Id.* at 156; *Mitchell*

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14 Under section 207(d)(2) of the Act, as amended in 1974, the "regular rate" of an employee does not include "reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's intrests and properly reimbursable by the employer, and other similar payments to an employee which are not made as compensation for his hours of employment."

v. Robert De Mario Jewelry, Inc., 361 U.S. 288, 80 S.Ct. 332, 4 L.Ed.2d 323 (1960); *Mitchell v. Goodyear Tire & Rubber Co.*, 278 F.2d 562 (8th Cir. 1960).

With an average hourly rate of $4.57, the back pay award is increased to $46,620.65. Section 16(b) of the Act now authorizes an additional equal amount as liquidated damages, bringing the total back pay and liquidated damages award to $93,241.30.

Reinstatement.

IT&T argues that reinstatement is a remedy "wholly outside the purview of the Fair Labor Standards Act." As the Supreme Court observed in *Robert De Mario Jewelry*, however, reinstatement and reimbursement may properly be combined to provide a complete judicial remedy, where an employee has been the victim of an unlawful discharge under section 215(a)(3). *See, Goldberg v. Bama Manufacturing Corporation.* Reinstatement is an appropriate remedy for unlawful discharge under the Act.

Attorney's Fees.

Section 16(b) of the Act provides that in any action successfully brought under its provisions, the court shall "allow a reasonable attorney's fee to be paid by the defendant." In accordance with this section, the district court awarded attorney's fees in the amount of $35,000. According to Reeves, this sum is woefully in-

adequate to properly compensate his attorney for the nearly 3,000 hours he claims to have spent on the case throughout its thirteen year federal court history. Reeves argues that his attorney is entitled to at least $50 an hour, an amount bringing his total attorney's fee claim to $150,000. We find no basis upon which to alter the district court's award. The attorney's fee determination rests in the sound discretion of the district court and will not be overturned in the absence of abuse. *Baxter v. Savannah Sugar Refining Corp.*, 495 F.2d 437 (5th Cir. 1974); *Montalvo v. Tower Life Building*, 426 F.2d 1135 (5th Cir. 1970). Although it is well-established that a district court need not take evidence concerning the value of attorney's services, the fact finder considered evidence presented by Reeves' attorneys on the length and complexity of their representation. *Montalvo v. Tower Life Building; Day & Zimmerman, Inc. v. Reid*, 168 F.2d 356 (8th Cir. 1948); *Campbell v. Green*, 112 F.2d 143 (5th Cir. 1940). As the magistrate's recommended order illustrates, the determination rested on factors recognized as critical in the assessment of attorney's fees in *Johnson v. Georgia Highway Express*, 488 F.2d 174 (5th Cir. 1974). We have recently recognized the applicability of the *Johnson* guidelines in a non-Title VII setting, *Piambino v. Bailey*, 610 F.2d 1306 (5th Cir. 1980). The district court entered its award after considering the time and labor required, the complexity involved, and the skill necessary to properly perform the services needed. *See, Johnson*, at 718-719. As we observed in *Montalvo*, "[a] trial court has firsthand knowledge of the

proceedings" and is in a uniquely qualified position to "place a value on [the attorney's] services." 426 F.2d at 1150. We affirm the district court's $35,000 award of attorney's fees.

We think an additional fee of $5,000 for this appeal is merited, and increase the award to $40,000 in accordance with our authority to make such an assessment. *See Montalvo; Bable v. T. W. Phillips Gas & Oil Co.*, 287 F.2d 21 (3rd Cir. 1961); *Holtville Alfalfa Mills, Inc. v. Wyatt*, 230 F.2d 398 (9th Cir. 1955).

Conclusion.

We summarize the damages award as redetermined by this decision as follows:

Straight time and overtime owed by defendant to plaintiff, plus liquidated damages	$22,164.28
Back pay owed by defendant to plaintiff for years 1967 through 1974, plus liquidated damages	93,241.30
Attorney's fee	40,000.00
Total award	$155,405.58

V. EXCLUSION OF CERTAIN WITNESSES

The record discloses that on August 22, 1973, counsel for IT&T met for three hours with at least eleven

prospective witnesses and discussed the case in preparation for testimony at the quantum hearing. The meeting and discussion constituted a direct and flagrant violation of a previously entered sequestration and separation order. The determination as to whether a violating witness shall be permitted to testify "is generally left to the sound discretion of the trial court." *United States v. Suarez*, 487 F.2d 236, 238 (5th Cir. 1973); *United States v. Moriarty*, 497 F.2d 486 (5th Cir. 1974). "[P]articular circumstances" support exclusion of testimony where the violation occurred with the "consent, connivance, procurement or knowledge" of counsel. *Holder v. United States*, 150 U.S. 91, 92, 14 S.Ct. 10, 37 L.Ed. 1010 (1893); *Braswell v. Wainwright*, 463 F.2d 1148, 1156 (5th Cir. 1972); *United States v. Schaefer*, 299 F.2d 625 (7th Cir. 1962). In light of the willful nature of the violation on the part of the witnesses and counsel, we do not overturn the district court's order prohibiting any testimony from the violating witnesses. *Holder v. United States; United States v. Torbert*, 496 F.2d 154 (9th Cir. 1974); *United States v. Eastwood*, 489 F.2d 818 (5th Cir. 1973).

The district court judgment for immediate reinstatement is AFFIRMED, and the damages award is increased in accordance with this decision.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-1286

HEWETT M. REEVES,
Plaintiff-Appellant,
Cross-Appellee,

versus

INTERNATIONAL TELEPHONE AND
TELEGRAPH CORPORATION,
Defendant-Appellee,
Cross-Appellant,

RAY MARSHALL, Secretary of Labor,
United States Department of Labor,
Intervenor-Appellant,
Cross-Appellee.

Appeals from the United States District Court for the
Western District of Louisiana

ON PETITION FOR REHEARING

Dated: June 23, 1980

Before GOLDBERG, FRANK M. JOHNSON and HATCHETT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ JOSEPH W. HATCHETT
JOSEPH W. HATCHETT
United States Circuit Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

HEWETT M. REEVES,
Plaintiff,

versus C.A. No. 13234

INTERNATIONAL TELEPHONE AND
TELEGRAPH CORPORATION,
Defendant,

W. J. USURY, JR., Secretary of Labor,
United States Department of Labor,
Intervenor.

Filed: September 9, 1977

SPECIAL MASTER'S REPORT
AND RECOMMENDATION ON QUANTUM

HISTORY OF THE CASE

Plaintiff, Hewett M. Reeves, brought this action on September 19, 1967, under the Fair Labor Standards Act, (FLSA), 29 U.S.C. §201, et seq. He alleged he worked an average of at least seventy-five hours per week; that he was paid by the hour and was in a non-exempt status; and that for overtime he was due the sum of at least $12,500 and a like sum for liquidated damages, plus reasonable attorney fees and all costs of suit.

Extensive discovery was conducted, and the case proceeded to trial before this Court. Following the Court's study of the record and briefs, plaintiff was held to be a non-exempt employee; consequently he was covered by the FLSA as shown by the Court's published opinion on the coverage question. *Reeves v. I.T. & T. Co.*, 357 F.Supp. 295 (April 27, 1973). Plaintiff was employed by defendant as a microwave field engineer. He had two stateside bases of operation, one at defendant's microwave home office at Raleigh, North Carolina, and the other at plaintiff's residence in Shreveport, Louisiana, where he operated a place of business for himself as well as a warehouse for storage of ITT equipment. From these two bases plaintiff was sent as "trouble-shooter" to contract job sites, literally to all parts of the earth, as directed by defendant. Plaintiff was employed by defendant in that capacity during the calendar years 1965, 1966, and until August 29, 1967, having

been terminated by ITT on the latter date immediately after he lodged a complaint with the Wage-Hour Division, Department of Labor, concerning his underpayments by defendant. During his employment, and especially while in the field, it was his responsibility to keep a record of his work time. This was done on a report form furnished by defendant, called "Time, Travel and Automobile Report", referred to often during hearings as "TTAR-S".

After determination was made by the Court that he was not an "exempt" employee, and that plaintiff's work was covered by the FLSA, an order of the Court was entered on July 26, 1973, wherein the undersigned Magistrate was appointed Special Master to conduct all necessary hearings as to the quantum of plaintiff's claims, the first hearing to be conducted on August 20, 1973. The designation of the undersigned Special Master was made pursuant to 28 U.S.C. §636, now 28 U.S.C. §636(b)(1)(B) and (C), Rule 53, F.R.Civ.P., and Local Court Rule 28 C.

During the course of the quantum hearings, by request of counsel for the parties, numerous settlement conferences were conducted among counsel, out of the presence of the Magistrate. This was one of many reasons, including scheduling problems, prior commitments of counsel, etc., for continued delay in completion of the trial on the quantum questions.

A memorandum minute entry of August 24, 1973 made by the Magistrate shows that, at the first quantum hearing on August 20, 1973, with all trial counsel present, the witnesses present were placed under the Rule of Sequestration. All attorneys then were ordered to place any and all other witnesses under this Rule, whether they then were present before the Court or not. This was agreed to specifically by all counsel.

After the quantum hearing commenced, the Secretary of Labor, through James F. Gruben, Esq., attorney for the Secretary, filed an intervention, which was allowed by the Court.

CONTENTIONS OF THE PARTIES

Plaintiff, defendant, and intervenor have favored us with extensive original and reply briefs, covering the quantum involved here. In plaintiff's original brief, it was contended that defendant failed to maintain proper records, and failed to furnish records in compliance with discovery orders. Plaintiff further contends that defendant committed a willful violation of the Act in discharging him, and that the three-year statute of limitations applies, covering the entire period of his employment; and that liquidated damages should be awarded; moreover, that plaintiff is entitled to an award of attorney fees from defendant as a part of the liquidated damages covered by the Act; and that defendant discharged plaintiff unlawfully under Section 15(a)(3) of the Act. (29 U.S.C. §215(a)(3)) Plaintiff

further contends that the expenses he had incurred, which were reimbursed by defendant, amounted to $980.00 per month, which should be added to plaintiff's earnings and included within the weekly amount to be awarded as liquidated damages. It is contended that plaintiff worked a total of 3,110 overtime hours for which he was not paid, either in straight time or in overtime. In summary, plaintiff claimed as liquidated damages for unpaid overtime hours the sum of $56,-228.74. He contends further that, because he was discharged unlawfully, he should be paid for his losses of income during the years 1967 through 1974, a total of $191,271.21. With respect to his claim for attorney fees, he asserts that his principal attorney spent 1,852 hours working on the case, as testified at the hearings, and that his associate counsel had expended 268 hours; consequently, that the award of attorney fees should be $101,980.00; and that interest should be allowed on the total amount of any judgment rendered.

In defendant's original brief, with attachments, there are posed seven specific categories affecting quantum which we consider pertinent, these being listed as follows:

(1) The number of overtime hours worked by plaintiff and any monies due for these not already paid.

(2) Whether defendant's failure to pay proper overtime was a willful violation of the

FLSA, thus extending the normal two-year statute of limitations to three years.

(3) Whether defendant had a good faith defense to the overtime violation which would preclude an award of liquidated damages.

(4) Whether reimbursed expenses paid to plaintiff are to be treated as compensation and part of his regular rate of pay.

(5) Whether the Court has jurisdiction to grant relief under Section 15(a)(3) of the FLSA; whether plaintiff was discharged in violation of that Section; and what damages, if any, exist because of the discharge.

(6) What attorney fees, if any, must be paid by defendant for plaintiff's counsel.

(7) Whether defendant is liable for interest upon any judgment rendered against it.

In summary, defendant contends that the net maximum overtime pay due plaintiff, not already paid, is $4,698.19, because of the two-year statute of limitations. At fn. 40 of defendant's brief is shown the total dollar amount of overtime hours paid as straight time by defendant for the years 1965, 1966 and 1967 in the total amount of $4,088.82.

Without conceding that there was an unlawful discharge, defendant urges that, if it were determined that such indeed had occurred, the maximum amount which defendant would owe to plaintiff for this would be the sum of $4,134.48. Defendant denies liability for attorney fees, contending that no adequate proof was shown to justify award of the fees claimed. Defendant further denies that any interest on any judgment found against it should be allowed. It lastly claims that procedural errors occurred during the hearings in not permitting defendant's witnesses to testify. (See Judge Dawkins' ruling on this, in the record.)

Intervenor, in his brief and supplemental brief, urges that plaintiff was unlawfully discharged from employment in violation of the FLSA, 29 U.S.C. §215(a)(3).[1] In his supplemental brief, he points to a handwritten note made by James R. Bennett, a representative of defendant: "M. H. Reeves [initials reversed] terminated 8/29/67, J. R. B." This was immediately after plaintiff went to the Wage-Hour Board to file his complaint on August 28, 1967. He urges that this unlawful dis-

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1 Prohibited acts; prima facie evidence

(a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person —

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;

charge entitles plaintiff to be reinstated by defendant to his former position; and to receive restitution of wage losses sustained by him as the result of his wrongful discharge.

FINDINGS OF FACT
AND CONCLUSIONS OF LAW

We have considered the entire record, including the transcript of the quantum hearings, the briefs of the parties, and observed the witnesses as they testified. From this, we make the following Findings of Fact and Conclusions of Law:

We find that defendant did not keep proper records, and those which were kept were at variance with each other, the TTAR-S which were completed by plaintiff with mandatory instructions from his supervisor not to show upon them the correct hours of overtime. Consequently, these were by no means indicative of all the overtime hours worked by plaintiff. Moreover, as seen from some of the exhibits on file, defendant was cognizant of the fact that, if overtime were paid to an employee, it should be paid on the basis of one and one-half times the regular hourly wage. Defendant discouraged, even ordered, its employees (including plaintiff) not to list overtime hours, even though the employee in the course of performing his job properly worked many so-called "gratis" hours for which he did not receive overtime pay, either straight or one and

one-half times his regular hourly wage, as required by the Act, 29 U.S.C. §207(a)(1). We further find that defendant's failure to pay proper overtime was a willful violation of the FLSA, thus extending the normal two-year statute of limitations to three years, as provided by 29 U.S.C. §255(a).[2] Support for these findings is seen in *Day and Zimmerman v. Reid,* 168 F.2d 356. Defendant knew, or should have known, it was covered by the Act, *Coleman, et al v. Jiffy June Farms, Inc.,* 458 F.2d 1139 (5th Cir., 1972). There the Court held that, even though the employer's lawyer advised him he need not fear federal overruling of an agreement with a union, changing rates of pay, this constituted a willful violation, thus entitling the employee plaintiffs to recover their unpaid wages for a three-year period. This also was the holding by Honorable Nauman S. Scott, now Chief Judge of this District, in *Thomas v. State of Louisiana,* 348 F.Supp. 792 (D.Ct. W.D. La., 1972). There the Court held that the State was in willful violation of the Act in relying upon a case pending before the

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2 Statute of limitations

Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act —

(a) if the cause of action accrues on or after May 14, 1947 — may be commenced within two years after the cause of action accrued, any every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued;

Supreme Court for determining whether the Act applied to State employees. The Court cited *Coleman v. Jiffy June Farms, Inc., supra,* in support of the ruling.

Reimbursed expenses may not be treated as compensation or part of plaintiff's regular rate of pay. No citation from the Act or cases has been given us concerning this question; and none have been found. Plaintiff was discharged unlawfully from his employment. It is clear that defendant knew that plaintiff was claiming overtime pay and had gone to the Wage-Hour Board to lodge a claim against it. This is evidenced by the record, which shows that plaintiff filed a complaint with that Board in Raleigh, North Carolina, defendant was aware of this, and discharged him the following day. Prior to then, defendant had given plaintiff excellent evaluation and fitness reports for the work he had done while employed on an hourly basis. This constituted a wrongful and unlawful discharge under the express terms of 29 U.S.C. §215(a)(3). *Walling v. O'Grady,* 146 F.2d 421 (2nd Cir., 1944). In that case, the Second Circuit reversed the District Court, holding that the employee had been discharged because he filed suit. It held further that the employee was entitled to back pay because of this unlawful discharge, remanding the case to the District Court to render an award. See, also, *Mitchell v. Dyess,* 180 F.Supp. 852 (So. D. Ala. 1960).

Plaintiff is entitled to recover reasonable attorney fees from defendant. This is provided by the Act,[3] as

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3 29 U.S.C. §216(b)

explicated by the jurisprudence. *Foster v. Irwin,* 258 F.Supp. 709 (E.D. La. 1966), held that where various employees were not properly compensated under the FLSA, and the amount due was not capable of exact mathematical ascertainment, an award must be made based upon estimate, opinion, and reasonable inferences to be drawn from available evidence. That decision also held that an award of attorney fees was mandatory but the amount due was left to the sound discretion of the Court. For willful violation of the Act and unlawful discharge, attorney fees must be allowed. *Foremost Dairies v. Ivey,* 204 F.2d 186 (5th Cir., 1953). There the Court awarded $2,000 in attorney fees on a recovery by the employees of $6,350.95. In *United Finance and Thrift Corp. of Dallas v. Chapman,* 369 S.W.2d 782 (1963), the jury awarded $1500 attorney fees while granting a $629.90 verdict for plaintiff, and a like amount as liquidated damages. An allowance of $6,000 as attorney fees, where the plaintiff recovered $3,-417.02 was held to be neither excessive nor inadequate, though $18,000 had been claimed. *Michigan Window Cleaning Co. v. Martino,* 173 F.2d 466 (6th Cir., 1949).

It is well settled under the Act that where an award is made to an employee as liquidated damages, interest on the award is not allowable. *Brooklyn Sav. Bank v. O'Neal,* 65 S.Ct. 895, 324 U.S. 697, Reh. Den. 65 S.Ct. 1189, 325 U.S. 893; *Thomas v. State of Louisiana, supra.*

Plaintiff has made substantially more than a prima facie showing that he actually worked overtime during the nearly three-year period during which he was employed by defendant. The record shows, and it is conceded by defendant, that plaintiff performed work well beyond 40 hours per week and was paid straight time for a total of 966 hours. He never was paid time and one-half of his regular wages, as provided by the Act, for any overtime hours. He claims he has performed 3,110 hours of overtime work for which he was not paid. This is denied by defendant, but it did not complete ordered discovery requirements, and at least seven weeks of records are missing completely from its files. Moreover, as has been alleged and shown, defendant did not keep proper records and, in fact, urged or mandated its employees not to list *any* overtime unless permission was granted. This prevented an employee from performing the work, especially in the field, as plaintiff was required to do, within a forty-hour week, and when he worked "gratis" hours, he was not allowed to list his hours or even be paid straight time for overtime. Thus, we are required, under the Act and jurisprudence, *Foster v. Irwin, supra; Foremost Dairies v. Ivey, supra; and Anderson v. Mt. Clements*, 66 S.Ct. 1187, 328 U.S. 680, (1946), to make an award based upon as close an approximation as possible as may be gleaned from the record.

The record shows that plaintiff worked a total of 118 weeks with an additional two weeks vacation. During his periods of employment he was paid at the rate of

$4.04 an hour, $4.33 an hour, and $4.57 an hour. Thus, his straight time hourly wage averaged $4.31 per hour. Under the Act, he was allowed to work only forty hours per week without overtime compensation. In most instances, especially while in the field, plaintiff's work week averaged far greater than forty hours and sometimes, almost doubled that figure. We find, therefore, that his average work week was sixty hours, or a twenty-hour average of overtime. This gives a total of 2,360 overtime hours. The record shows he was compensated by defendant for straight time of 966 hours, thus revealing a total of 1,394 hours not compensated by either straight time or time and one-half as required by the Act. One and one-half for overtime calculated upon his regular hourly wage is $6.46. This amounts to $9,005.24. Moreover, defendant owes one-half additional time for the 966 hours for which plaintiff was paid straight time. This amounts to (966 x $2.15), a total of $2,076.90, which added to the $9,005.24 gives a total of $11,082.14. Plaintiff, then, is entitled to receive as liquidated damage, double the latter figure, or $22,164.28.

We accept the figure submitted by defendant, at page 97 of its brief, its summation being the sum of $4,-134.48, as his diminished earnings brought about by his unlawful discharge. To this we add the sum of $2,000 as damages caused by his discharge, in accordance with the jurisprudence. Thus, the total amount of back pay and liquidated damages, together with damages for his unlawful discharge, amounts to the sum of $28,298.76.

Attorney fees are claimed for Leroy Scott, Esq. for a total of 1,852 hours at $50.00 per hour, and for B. J. Woods, Esq., his associate, 268 hours at $35.00 per hour. We are aware of the complexities involved in this case, their numerous days in court and their more numerous days of legal work performed by these lawyers out of court. We also are well aware that there are many cases where numerous hours are involved where an attorney is not compensated adequately. This appears to be one of those cases. We would consider, therefore, that an award for attorney fees for plaintiff's counsel should be assessed in the sum of $25,000. This totals an award to plaintiff of $53,298.76.

This award made to plaintiff for hourly wages and overtime wages, which defendant must pay, should be subject to withholding and social security taxes, and any other taxes required by law to be deducted. Defendant also should be required to reinstate plaintiff in his former job category with seniority equal to that which he would have attained, but for his wrongful discharge, and at current rates of pay for that position.

RECOMMENDATIONS

It is recommended, therefore, that judgment be entered making an award to plaintiff, for all of his claims, in the total sum of $53,298.76, and that he be reinstated as immediately above indicated.

THUS DONE AND SIGNED, in Chambers, at Shreveport, Louisiana, this 8th day of September, 1977.

/s/ JAMES M. BARTON
JAMES M. BARTON
UNITED STATES MAGISTRATE
(SPECIAL MASTER)

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

(Number and Title Omitted)

Filed: November 15, 1977

RULING ON SPECIAL MASTER'S REPORT AND RECOMMENDATION ON QUANTUM

Pursuant to 28 U.S.C. §636, now 28 U.S.C. §636(b)(1)(B) and (C), Rule 53 F.R.Civ.P., and Local Court Rule 28 C, the United States Magistrate was appointed Special Master to conduct hearings and make a report and recommendation on quantum.

The Special Master made his twelve-page Report, including findings of fact and conclusions of law and recommendations. This was filed on September 9, 1977. Plaintiff, Intervenor and Defendant, all have filed objections to the report and recommendations submitted by the Magistrate.

The findings of fact and conclusions of law contained in the Special Master's Report and Recommendations are adopted with the following amendments as to back pay and attorney's fee owed by defendant to plaintiff:

BACK PAY

Projected Annual Rate of Pay of Hewett M. Reeves:

	Year	Plaintiff's Earnings	Owed Plaintiff by Defendant
	1967		
52 wks. x 40 hrs.			
2080 hrs.			
at $4.31 =	$ 8,964.80		
52 wks. x 20 O.T. =	6,718.40		
	$15,683.20		
Less last earnings with ITT in 1967	9,500.00		
	$ 6,183.20	$ 1,307.72	$ 4,875.48
	1968		
Average earnings	$15,683.20	8,360.00	7,323.20
	1969		
Average earnings	$15,683.20	8,840.00	6,843.20

BACK PAY

Projected Annual Rate of Pay of Hewett M. Reeves:

	Year	Plaintiff's Earnings	Owed Plaintiff by Defendant
	1970		
Average earnings	$15,683.20	11,285.47	4,397.73
	1971		
Average earnings	$15,683.20	9,395.80	6,287.40
	1972		
Average earnings	$15,683.20	14,569.00	1,114.20
	1973		
Average earnings	$15,683.20	7,442.95	8,240.25
	1974		
Average earnings	$15,683.20	15,715.77	---
			$39,081.46

No evidence was taken as to the years 1975, 1976 and 1977 which still are to be accounted.

The attorney's fee to be awarded in this type of case is discretionary with the Court, according to the jurisprudence. We take notice that this litigation extended over approximately ten years; the time spent in court by all attorneys involved on the trial of the merits, and before the Magistrate on the quantum hearing, as well as time spent out of court in consultations, preparing pleadings and briefs, and status conferences, concerning this case.

Consequently, the award of an attorney's fee on behalf of plaintiff is increased to the sum of $35,000.00.

Accordingly, summarizing, the award to plaintiff is as follows:

Straight time and overtime owed by defendant to plaintiff, plus liquidated damages	$22,164.28
Back pay owed by defendant to plaintiff for years 1967 through 1974	39,081.46
Attorney's fee	35,000.00
	$96,245.74

Otherwise, the Magistrate's recommendations are adopted as the judgment of the Court.

THUS DONE AND SIGNED, in Chambers, at Shreveport, Louisiana, this 15th day of November, 1977.

/s/ BEN C. DAWKINS, JR.
BEN C. DAWKINS, JR.
UNITED STATES SENIOR
DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

(Number and Title Omitted)

Filed: November 15, 1977

JUDGMENT

Considering the Special Master's Report filed with this Court on September 9, 1977, the objections to the report and recommendations filed by plaintiff, intervenor, and defendant, and considering all pleadings filed in this case, supported by briefs;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff Hewett M. Reeves and against defendant International Tele-

phone and Telegraph Corporation in the sum of Ninety-Six Thousand Two Hundred Forty-Five Dollars and Seventy-Four Cents ($96,245.74).

IT IS FURTHER ORDERED that defendant International Telephone and Telegraph Corporation immediately reinstate Hewett M. Reeves to the former position he held with the Company with all benefits he would have received had he not been terminated illegally by defendant. All costs are to be borne by defendant.

JUSTMENT ENTERED AND SIGNED, in Chambers, at Shreveport, Louisiana, this 15th day of November, 1977.

/s/ BEN C. DAWKINS, JR.
BEN C. DAWKINS, JR.
UNITED STATES SENIOR
DISTRICT JUDGE

APPENDIX F

29 U.S.C. 216(b)

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime com-

pensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 15(a)(3) of this Act shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 15(a)(3), including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 17 in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 6 or section 7 of this Act by an

employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 15(a)(3).

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29 U.S.C. 203(m)

(m) "Wage" paid to any employee includes the reasonable cost, as determined by the Secretary of Labor, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees: *Provided,* That the cost of board, lodging, or other facilities shall not be included as a part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective-bargaining agreement applicable to the particular employee: *Provided further,* That the Secretary is authorized to determine the fair value of such board, lodging, or other facilities for defined classes of employees and in defined areas, based on average cost to the employer or to groups of employers similarly situated, or average value to groups of employees, or other appropriate measures of fair value. Such evaluations, where applicable and pertinent, shall be used in lieu of actual measure of cost in determining the wage paid to any employee. In determining the wage of a tipped employee, the amount paid such employee by his employer shall be deemed to be increased on account of tips by an amount determined by the employer, but not by an amount in excess of 40 per centum of the applicable minimum wage rate, except that the amount of

the increase on account of tips determined by the employer may not exceed the value of tips actually received by the employee. The previous sentence shall not apply with respect to any tipped employee unless (1) such employee has been informed by the employer of the provisions of this section, and (2) all tips received by such employee have been retained by the employee, except that nothing herein shall prohibit the pooling of tips among employees who customarily and regularly receive tips.

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29 C.F.R. 778.217(d)

(d) *Payments for expenses personal to the employee.* The expenses for which reimbursement is made must, in order to merit exclusion from the regular rate under this section, be expenses incurred by the employee on the employer's behalf or for his benefit or convenience. If the employer reimburses the employee for expenses normally incurred by the employee for his own benefit, he is, of course, increasing the employee's regular rate thereby. An employee normally incurs expenses in travelling to and from work, buying lunch, paying rent, and the like. If the employer reimburses him for these normal everyday expenses, the payment is not excluded from the regular rate as "reimbursement for expenses." Whether the employer "reimburses" the employee for such expenses or furnishes the facilities (such as free lunches or free housing), the amount paid to the employee (or the reasonable cost to the employer or fair value where facilities are fur-

nished) enters into the regular rate of pay as discussed in §778.116. See also §531.37(b) of this chapter.

APPENDIX G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

HEWETT M. REEVES,
Plaintiff,

versus CA No. 13,234

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION,
Defendant,

PETER J. BRENNAN, Secretary of Labor, United States Department of Labor,
Intervenor.

MOTION

NOW INTO COURT, through undersigned counsel, comes INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION ("ITT"), and respectfully shows that:

1.

The judgment of the District Court in this matter was entered November 15, 1977.

2.

Hewett M. Reeves ("Reeves") appealed from that judgment, and ITT filed a cross appeal.

3.

By opinion dated May 15, 1980 (a copy of which is attached) the United States Court of Appeals for the Fifth Circuit amended and affirmed the judgment of the District Court.

4.

The Fifth Circuit found Reeves to be entitled to the following: straight time and overtime pay, plus liquidated damages, in the amount of $22,164.28; back pay for the years 1967 through 1974, plus liquidated damages, in the amount of $93,241.30; attorney's fees of $40,000.00; for a total award of $155,405.58.

5.

Reeves' petition for rehearing in the Court of Appeals was denied, and on July 3, 1980, the opinion of the Fifth Circuit became its mandate.

6.

Reeves, through counsel, claims entitlement to legal interest on his award of $155,405.58 from November 15, 1977, until paid, and further contends he is entitled to receive back pay and liquidated damages from 1975 until November 15, 1977, and full pay thereafter at the rate of $32,375.00 per year (assuming sixty hour work weeks), together with lost employee benefits.

7.

Although the judgment of this Court as affirmed in the mandate of the Fifth Circuit entitles Reeves to immediate reinstatement and restoration of benefits, ITT denies that Reeves is entitled to legal interest on his award, and Reeves has shown no proof of entitlement to back pay and liquidated damages for the years 1975 forward.

8.

As more fully appears from the copy of the complaint in the matter styled "Hewett M. Reeves v. Arco Pipe Line Company," Civil Action Number P-78-22-CA on the docket of the U.S. District Court for the Eastern District of Texas, Paris Division, attached as Exhibit "A", Reeves was employed for at least some portion of the period from 1975 forward, and any wages received by him during that period, plus any award which he might receive as a result of his action against Arco, would be required to be offset against any potential liability of ITT.

9.

As more fully appears from the letter attached hereto as Exhibit "B", Reeves has been tendered reinstatement by ITT in the position of Associate Field Engineer at an annual salary of $19,900.00.

10.

ITT attaches hereto and tenders into the registry of the Court the sum of $141,411.81 in satisfaction of the mandate of the U.S. Court of Appeals for the Fifth Circuit, which sum has been calculated as follows: From the award of $155,405.58 have been deducted FICA Withholdings of $1,587.67 for the year 1980; Federal Income Tax Withholdings of $11,540.56; and Louisiana Income Tax Withholdings of $865.54.

11.

The mandate of the Fifth Circuit is therefore satisfied to the extent of Reeves' monetary award for straight time, overtime and back pay owed him for the years 1967 through 1974, together with liquidated damages and attorney's fees.

12.

Therefore, the supersedeas bond filed in this proceeding by ITT February 9, 1978, should be ordered cancelled.

In order properly to determine the value of any retroactive employee benefits to which Reeves may be entitled and to determine the amount of back wages and liquidated damages due him, if any, for the years 1975 forward, an evidentiary hearing should be scheduled.

WHEREFORE, APPEARER MOVES:

a) That the Clerk of this Court be directed to receive the tender of $141,411.81 in satisfaction of the mandate of the U.S. Court of Appeals for the Fifth Circuit in this matter and to hold that sum in the registry of the Court pending further order of Court;

b) That the Court fix an evidentiary hearing for the purpose of implementation and clarification of the mandate of the U.S. Court of Appeals for the Fifth Circuit respecting the value of any retroactive employee benefits due Reeves and his entitlement to back wages and liquidated damages, if any, for the years 1975 forward; and

c) That the supersedeas bond filed in this matter by ITT February 9, 1978, be cancelled.

COOK, YANCEY, KING
& GALLOWAY

/s/ Sidney E. Cook
Sidney E. Cook
600 Commercial National Bank
Bldg.
Shreveport, Louisiana 71101

CERTIFICATE

I HEREBY CERTIFY that a copy of the above and foregoing has been served upon all counsel of record by placing same in the United States mail, properly addressed and postage prepaid thereon.

Shreveport, Louisiana, this 16th day of July, 1980.

/s/ Sidney E. Cook
OF COUNSEL

No. 80-443

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HEWETT M. REEVES,

Petitioner,

v.

INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION,

Respondent,

RAY MARSHALL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Intervenor.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

HERSCHEL E. RICHARD, JR.
COOK, YANCEY, KING & GALLOWAY
600 Commercial National Bank Bldg.
Shreveport, Louisiana 71101
(318) 221-6277

Counsel for Respondent

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED FOR REVIEW

Petitioner originally commenced this action against respondent to recover unpaid wages and liquidated damages allegedly due under the Fair Labor Standards Act, 29 U.S.C. §§201-219. Under the mandate of the United States Court of Appeals for the Fifth Circuit petitioner was awarded the following: straight-time and overtime pay, plus liquidated damages, in the amount of $22,164,28; back pay for the years 1967 throught 1974, plus liquidated damages, in the amount of $93,241.30; attorney's fees of $40,000.00; for a total award of $155,405.58. The questions presented for review are:

1. Whether the Court of Appeals was correct in excluding from "wages" under 29 U.S.C. §203(m) reimbursements made by an employer to an employee for expenses incurred by the employee on the employer's behalf.

2. Whether, under the particular facts of this case, the Court of Appeals properly exercised its discretion in fashioning petitioner's remedy under 29 U.S.C. §216(b).

3. Under 29 U.S.C. §216(b) an unlawfully discharged employee may recover, *inter alia*, "wages lost and an additional equal amount as liquidated damages;" should the calculation of "wages lost" ignore sums earned by the employee in mitigation of damages through substitute employment when determining liquidated damages?

4. Did petitioner's counsel receive an adequate attorney's fee?

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No. 80-443

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HEWETT M. REEVES,

Petitioner,

v.

INTERNATIONAL TELEPHONE &
TELEGRAPH CORPORATION,

Respondent,

RAY MARSHALL, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

Intervenor.

**On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit**

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, International Telephone & Telegraph Corporation, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Fifth Circuit's opinion in this case. That opinion is reported at 616 F.2d 1342. (App. A, *infra*)

STATUTES INVOLVED

29 U.S.C. §216(b) is lengthy and is set forth in full in Appendix B. It provides in pertinent part:

". . . Any employer who violates the provisions of section 215(a) (3) of this title shall be liable for such

legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a) (3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. . . ."

29 U.S.C. §203(m) is lengthy and is set forth in full in Appendix B. It provides in pertinent part:

" 'Wage' paid to any employee includes the reasonable cost . . . to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees . . ."

29 C.F.R. §778.217 is lengthy and is set forth in full in Appendix B. It provides in pertinent part:

"Reimbursement for expenses.

(a) *General rule.* Where an employee incurs expenses on his employer's behalf or where he is required to expend sums solely by reason of action taken for the convenience of his employer, section 7(e)(2) [29 U.S.C. §207(e)2)] is applicable to reimbursement for such expenses. Payments made by the employer to cover such expenses are not included in the employee's regular rate (if the amount of the reimbursement reasonably approximates the expenses incurred). Such payment is not compensation for services rendered by the employees during any hours worked in the workweek."

29 U.S.C. §207(e)(2) is lengthy and is set forth in full in Appendix B. It provides in pertinent part:

"(e) As used in this section the 'regular rate' at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include —

* * *

"(2) . . . [R]easonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer . . ."

STATEMENT OF THE CASE

Petitioner was employed by respondent in May, 1965, as an installer of microwave equipment. Petitioner's initial compensation was $8,400.00 annually. In the course of his duites, petitioner was required to travel to remote parts of the world installing and testing microwave equipment. As noted by the Court of Appeals, petitioner "received reimbursements averaging $980.00 per month for travel, lodging, eating and other personal expenses incurred while on business with the company." (App. A, p. 2a n. 1). Following his discharge by respondent August 29, 1967, petitioner instituted this action charging respondent with unlawful discharge under 29 U.S.C. §15(a)(3), and seeking recovery of unpaid wages and liquidated damages.

Petitioner recovered judgment in the District Court ordering (i) reinstatement; (ii) payment of $61,245.74 as unpaid overtime, lost wages and liquidated damages; and (iii) $35,000.00 attorney's fees. Petitioner appealed from the judgment, and respondent lodged a cross-appeal.

The U. S. Court of Appeals for the Fifth Circuit increased petitioner's award for back pay and liquidated damages to $93,241.30; awarded an additional $5,000.00 as attorney's fees; and affirmed the judgment of the District Court as amended. Petitioner's application for rehearing was denied. Respondent then paid the sums ordered by the Court of Appeals into the registry of the District Court, and this petition followed.

REASONS FOR DENYING THE WRIT

1. The Court Of Appeals Fully Considered And Correctly Decided All Issues Presented For Review By Petitioner.

Petitioner has articulated no valid reason for granting his writ. Those which he cites represent nothing more than petitioner's contentions argued to and rejected by the Court of Appeals. To this extent, petitioner's contentions in this Court must be viewed as simply an expression of his disagreement with the legal conclusions of the Court of Appeals and dissatisfaction with the result of his case. Such argument, unsupported by proper reference to the considerations governing review on certiorari set forth in Rule 17 of the Rules of the Supreme Court, must be looked upon as an attempt by petitioner to relitigate issues decided unfavorably as to him below. Clearly such is not the function of review on writ of certiorari.

(a) *The Definition of Wages Under 29 U.S.C. §203(m) Does Not Include an Employee's Employment Related Expenses Reimbursed by the Employer.* In calculating the damages to which he is entitled, petitioner seeks to have included as wages those amounts he was reimbursed for alleged "purely personal expenses." (p. 8). The Court of Appeals, however, did not, as petitioner states, recognize the expenses for which petitioner had been regularly reimbursed by respondent as "purely personal." To the contrary, the Court of Appeals properly recognized that all reimbursements received by petitioner from respondent were for "travel, lodging, eating and other personal expenses incurred while on business with the company." (App. A, p. 2a). In so doing the Court of Appeals correctly interpreted 29 U.S.C. §203(m) to apply to "employer furnished facilities, and

not to reimbursed out-of-pocket personal expenses." (App. A, p. 18a).

Petitioner relies solely upon 29 C.F.R. §778.217(d) in support of his position. This regulation, however, focuses only on employer reimbursement of an employee's expenses incurred by the employee "for his own benefit," not those incurred while on business with the company. Regarding the latter, the general rule, which petitioner fails to cite, is stated in 29 C.F.R. §778.217(a), providing that:

> "Where an employee incurs expenses on his employer's behalf or where he is required to expend sums solely by reason of action taken for the convenience of employer, §7(e)(2) [29 U.S.C. §207(e)(2)] is applicable to reimbursement for such expenses. Payments made by the employer to cover such expenses are not included in the employee's regular rate (if the amount of the reimbursement reasonably approximates the expenses incurred). Such payment is not compensation for services rendered by the employees during any hours worked in the workweek."

The statute to which the regulation refers, 29 U.S.C. §207(e)(2), provides expressly that:

> "The 'regular rate' at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include —
>
> * * *
>
> (2) . . . Reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer . . ."

As noted by the Court of Appeals, the expenses for which petitioner was reimbursed by respondent were oc-

casioned by petitioner's travels to "contract sites in remote areas of the world installing and testing microwave equipment." (App. A, p. 2a). Clearly, where an employee is traveling in connection with his employment duties and incurs substantial expenses, such expenses are not incurred by the employee for his own benefit. Those are expenses which are not "normal everyday expenses," which would be included in calculating the employee's regular rate of pay under 29 C.F.R. §778.217(d), but are expenses incurred as a result of the employment relation. Reimbursement of this sort does not increase the employee's compensation, but merely keeps him from being penalized financially by having to travel in his employment.[1] Accordingly, reimbursement of such expenses incurred by an employee as a result of his employment are not includable as wages within the clear meaning of 29 U.S.C. §203(m).

(b) *Petitioner Has Been Compensated Appropriately For His Unlawful Discharge As Required By 29 U.S.C. §216(b).* As a result of his discharge, petitioner to date has been awarded $155,405.58. This award reflects petitioner's damages only through 1974. There remains pending in the District Court the issue of petitioner's entitlement to back wages and liquidated damages, if any, for the years 1975 forward to July 15, 1980, the date of petitioner's reinstatement as respondent's employee.

As recognized by this Court in *Mitchell* v. *De Mario Jewelry, Inc.*, 361 U.S 288 (1960), the relief afforded a

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[1] A contrasting situation would be presented by an employer who paid for an employee's dwelling and other normal living expenses as part of his compensation. That situation did not exist in this case, and no "loophole" has been created in the law as contended by petitioner.

litigant who successfully prosecutes an action under 29 U.S.C. §15(a)(3) is equitable in nature. The question of relief, therefore, addresses itself to the sound discretion of the Court which fashions the remedy. *Id.* In the case at hand, the award which petitioner has received represents the result of the considered discretion of both the District Court and Court of Appeals, and petitioner has shown no basis upon which the lower courts' discretion can be said to have been abused.

It is well settled that this Honorable Court will not undertake to review concurrent factual findings entered by two courts below "in the absence of a very obvious and exceptional show of error." *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967). Respondent respectfully submits that the basis which underpins this principle should apply with equal force where, as here, two courts properly have exercised considered discretion in the fashioning of equitable relief.

In calculating petitioner's award, the Court of Appeals was careful to exercise its power of review with respect to the discretionary award of the District Court within the framework of the purposes of the Fair Labor Standards Act. (App. A, p. 19a-20a). In so doing, the Court of Appeals acted completely in accordance with the principles of review articulated by this Court in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975); its award, therefore, should not be disturbed.[2]

(c) *The Award Of Liquidated Damages Is Required By Statute To Be Based Upon Actual Wages Lost By An*

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[2] Significantly, the Secretary of Labor, whose forceful argument resulted in an increase in petitioner's award on appeal, elected not to petition for a writ of certiorari.

Unlawfully Discharged Employee. The employer's liability for an unlawful discharge is set forth in 29 U.S.C. §216(b) as follows:

> ". . . Any employer who violates the provisions of §15(a)(3) of this Act shall be liable for . . . payment of wages lost and an additional amount as liquidated damages . . . "

Petitioner, citing no authority, argues that the calculation of "wages lost" is purely a function of a discharged employee's wage times the period of discharge, and he charges the Court of Appeals with error in computing wages lost be reducing the product of that function by sums earned by petitioner through substitute employment. Respondent submits that petitioner's novel theory is contrary not only to the literal language of the statute, but also to its purpose. The Fair Labor Standards Act is not penal in nature; rather it is designed to serve the national purpose by insuring just compensation to the members of the workforce. *Mitchell* v. *De Mario Jewelry, Inc.*, 361 U.S. 288 (1960).

The plain language of the statute provides that liquidated damages are based upon the "wages lost" by an unlawfully discharged employee. Where, as here, such an employee procures substitute employment, he necessarily limits the amount of "wages lost." In order to calculate the employee's actual loss of earnings, earnings from substitute employment must be deducted from the earnings he would have received from the employer who discharged him unlawfully. The difference between the two figures is the amount by which the employee must be compensated to be made whole. Clearly, then, it is only this difference which represents the wages lost

and which, in turn, is subject to an additional award of liquidated damages under the statutory provision.[3]

Under well settled principles of labor relations law, an employee who has been unlawfully discharged has a duty to mitigate his damages, i.e., his "wages lost." Petitioner's theory ignores this rule completely.

(d) *An Adequate Attorney's Fee Was Awarded Petitioner's Counsel.* Petitioner contends that an inadequate sum was awarded as attorney's fees in this litigation. Petitioner's counsel was awarded $35,000.00 by the District Court, and the award was increased to $40,000.00 by the Court of Appeals to compensate petitioner's counsel for his efforts on appeal.

The governing statute, 29 U.S.C. §216(b), provides that a successful litigant must be awarded a "reasonable attorney's fees to be paid by the defendant." Like the substantive remedy to be afforded the successful litigant, the determination of a reasonable attorney's fee rests in the sound discretion of the District Court. *Baxter* v. *Savannah Sugar Refining Corporation*, 495 F.2d 437 (5th Cir. 1974); *Montalvo* v. *Tower Life Building*, 426 F.2d 1135 (5th Cir. 1970). In affirming the District Court's exercise of discretion in connection with the award of attorney's fees herein, the Fifth Circuit was careful to note that the District Court "entered its award after considering the time and labor required, the com-

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[3] Under petitioner's theory, if an employee who was receiving $200.00 per week were unlawfully discharged and immediately procured substitute employment at an identical wage, the employee would nonetheless be entitled to liquidated damages in the additional amount of $100.00 per week. This result would follow even though the employee had no "wages lost." Clearly, such a result is inconsistent with the express language of 29 U.S.C. §216(b).

plexity involved, and the skill necessary to properly perform the services needed." (App. A, p. 20a). For the reasons set out in Subparagraph (b) above, the adequacy of this award should not be a proper subject for review on writ of certiorari.

2. Petitioner Has Failed To Pose Any Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court.

Petitioner's contentions regarding the calculation of wages and liquidated damages under 29 U.S.C. §203(m) and 29 U.S.C. §216(b), respectively, do not present issues of sufficient importance to warrant review. Respondent, while conceding that the legal theories advanced by petitioner in support of these two issues have not been ruled on by this Court, submits that petitioner's legal theories are at such variance with the express language of the statutory provisions involved that they cannot be deemed to present questions of sufficient import for review. Unless and until an appellate court should rule in accordance with petitioner's advocated interpretation of these statutes, no reason exists for the grant of certiorari.

The balance of petitioner's argument goes to his complaints respecting his perceived inadequacy of the equitable relief which he has been accorded. In this regard, the issues presented by petitioner are pertinent only to the litigants, for it is only they who are affected by the exercise of discretion below. Indeed, respondent suggests that the very purpose served by the notion of equitable relief is the need of the courts to have the flexibility to tailor relief to the particular facts and circumstances of each case. To this end "[e]quity eschews mechanical rules . . . [and] depends upon flexibility."

Holmberg v. *Armbrecht*, 327 U.S. 392, 396 (1946). Where, as here, equitable remedies properly have been tailored to the successful litigant by the Court of Appeals, there is no occasion for review on writ of certiorari.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

HERSCHEL E. RICHARD, JR.
COOK, YANCEY, KING & GALLOWAY
600 Commercial National Bank Bldg.
Shreveport, Louisiana 71101
(318) 221-6277

Counsel for Respondent

APPENDIX

APPENDIX A

HEWETT M. REEVES, *Plaintiff-Appellant Cross-Appellee,*

v.

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, *Defendant-Appellee Cross-Appellant,*

Ray Marshall, Secretary of Labor, United States Department of Labor, Intervenor-Appellant Cross-Appellee.

NO. 78-1286.

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT.

May 15, 1980.

Appeals from the United States District Court for the Western District of Louisiana.

Before GOLDBERG, FRANK M. JOHNSON, JR. AND HATCHETT, *Circuit Judges:*

An employee, Hewett M. Reeves, instituted this action in September, 1967, to recover unpaid wages and liquidated damages allegedly due him from International Telephone and Telegraph Corporation (IT&T) under the Fair Labor Standards Act (Act), 29 U.S.C. §§201-219. The Secretary of Labor (Secretary) subsequently intervened under section 11(a) and section 17 of the Act. By appeal and cross-appeal, the parties seek review of the district court's judgment ordering reinstatement and awarding $96,245.74 to claimant for unpaid wages, liquidated damages, back pay and attorney's fees. We affirm, the judgment on liability and reinstatement, but increase the damages awarded for back pay and attorney's fees.

Facts

Nature of Employment.

In May, 1965, Reeves was employed by IT&T as a microwave field engineer at a compensation rate of $8,400 per

year.[1] In that capacity, he traveled to contract sites in remote areas of the world installing and testing microwave equipment. In conducting his duties, Reeves followed prescribed procedures and standards in the utilization of complex measuring devices to ensure that equipment installed performed within a predetermined range of tolerance. It was Reeves's responsibility, as an employee whose primary duties were performed outside the supervisory presence of his employer, to maintain and report hourly work records. These records were maintained primarily for billing purposes and, as claimant contends, to form the basis for an accurate calculation of compensable overtime hours.

During his period of employment, Reeves regularly lodged complaints with supervisors and colleagues over what he considered to be a failure on IT&T's part to adequately compensate him for overtime hours reported. On August 28, 1967, Reeves formalized his grievance by filing a complaint with the Wage and Hour Division of the Department of Labor. The following day, August 29, 1967, Reeves was terminated from his employment at IT&T.

Procedural History.

Reeves instituted this action with his timely complaint in federal court charging IT&T with unlawful discharge under section 15(a)(3)[2] and requesting unpaid wages and liquidated

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[1] Reeves also received reimbursements averaging $980 per month for travel, lodging, eating and other personal expenses incurred while on business with the company.

[2] 29 U.S.C. §215(a)(3) [§ 15(a)(3) of the Act] provides as follows:

> (a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person —
>
> (3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee . . . .

damages computed from an estimated average workweek of approximately 75 hours. Claiming that Reeves was an exempt employee working for the company in a bona fide executive, administrative, or professional capacity as described in 29 U.S.C. § 213(a)(1),[3] IT&T denied the charges.

On April 27, 1973, the district court ruled against IT&T on the exemption question and appointed a United States Magistrate to take evidence and make recommendations on the quantum issue. *Reeves* v. *International Telephone & Telegraph*, 357 F.Supp. 295 (W.D.La.1973). In the opening hearings before the magistrate, IT&T moved to dismiss Reeve's action under section 15(a)(3) on the grounds that the court lacked jurisdiction under the Act to entertain a private civil action to recover damages for discharge under the provision. In written support of its motion, IT&T maintained that only the Secretary of Labor was authorized under the Act to seek relief. Hearings before the magistrate were stayed, pending a ruling by the district court on the motion to dismiss. That ruling came on July 26, 1973, when the district court denied the motion "as having been filed too late and having further delayed the trial of this case." Four weeks later, the Secretary petitioned for intervention under section 11(a) of the Act. The Secretary filed with the petition a complaint seeking equitable redress on behalf of Reeves for employer violations under section 15(a)(3). The district court granted the motion for intervention, and quantum hearings before the magistrate were reinstituted.

Magistrate's Report and District Court Judgment.

In his quantum report filed on September 9, 1977, the magistrate concluded that IT&T unlawfully discharged Reeves

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[3] 29 U.S.C. §213(a)(1) provides:

(a) The provisions of section 206 . . . and section 207 of this title shall not apply with respect to —

(1) any employee employed in a bona fide, executive, administrative, or professional capacity . . . .

and wilfully withheld overtime wages during the period of his employment. Accordingly, he recommended a judgment immediately reinstating Reeves and awarding him appropriate back pay, unpaid wages and attorney's fees. Calculating the award based on a 60 hour workweek at an average straight time hourly wage of $4.31 per hour, the magistrate determined that Reeves was entitled to $22,164.28 as unpaid wages and liquidated damages, and $6,134.48 back pay and diminished earnings.[4] An additional $25,000 for attorney's fees brought the magistrate's total recommended award to $53,298.76. Reimbursed expenses were disallowed.

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[4] The magistrate's computations are explained in the following excerpt from the quantum report:

> The record shows that plaintiff worked a total of 118 weeks with an additional two weeks vacation. During his periods of employment he was paid at the rate of $4.04 an hour, $4.33 an hour, and $4.57 an hour. Thus, his straight time hourly wage averaged $4.31 per hour. Under the Act, he was allowed to work only forty hours per week without overtime compensation. In most instances, especially while in the field, plaintiff's work week averaged far greater than forty hours and sometimes, almost doubled that figure. We find, therefore, that his average work week was sixty hours, or a twenty-hour average of overtime. This gives a total of 2,360 overtime hours. The record shows he was compensated by defendant for straight time of 966 hours, thus revealing a total of 1,394 hours not compensated by either straight time or time and one-half as required by the Act. One and one-half for overtime calculated upon his regular hourly wage is $6.46. This amounts to $9,005.24. Moreover, defendant owes one-half additional time for the 966 hours for which plaintiff was paid straight time. This amounts to (966 x $2.15) a total of $2,076.90, which added to the $9,005.24 gives a total of $11,082.14. Plaintiff, then, is entitled to receive as liquidated damage, double the latter figure, or $22,164.28.
>
> We accept the figure submitted by defendant, at page 97 of its brief, its summation being the sum of $4,134.48, as his diminished earnings brought about by his unlawful discharge. To this we add the sum of $2,000 as damages caused by his discharge, in accordance with the jurisprudence. Thus, the total amount of back pay and liquidated damages, together with damages for his unlawful discharge, amounts to the sum of $28,298.76

The district court increased the back pay award to reflect the amount owed for year 1967 through 1974 ($39,081.46)[5] and increased the attorney's fees to $35,000. In all other respects the magistrate's recommendations were adopted.

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[5] The district court arrived at the $39,081.46 figure through the following computation.

BACK PAY

Projected Average Annual Rate of Pay of Hewett M. Reeves:

	Year	Plaintiff's Earnings	Owed Plaintiff by Defendant
	1967		
52 wks. x 40 hrs. = 2080 hrs. at $ 4.31 =	$ 8,964.80		
52 wks. x 20 Q.T. =	6,718.40		
	$ 15,683.20		
Less last earnings with ITT in 1967	9,500.00		
	$ 6,183.20	$ 1,307.72	$ 4,875.48
	1968		
Average earnings	$ 15,683.20	8,360.00	7,323.20
	1969		
Average earnings	$ 15,683.20	8,840.00	6,843.20
	1970		
Average earnings	$15,683.20	11,285.47	4,397.73
	1971		
Average earnings	$ 15,683.20	9,395.80	6,287.40
	1972		
Average earnings	$ 15,683.20	14,569.00	1,11.20
	1973		
Average earnings	$ 15,683.20	7,442.95	8,240.25
	1974		
Average earnings	$ 15,683.20	15,715.77	—
			$ 39,081.46

Immediate reinstatement was ordered and damages for Reeves were assessed at $96,245.74.[6] Each party finds error in this judgment.

Issues

IT&T contends that the district court erred in (1) asserting jurisdiction under the Act; (2) adjudicating Reeve's nonexempt status; (3) finding an unlawful discharge; (4) calculating damages and attorney's fees; and (5) excluding key defense witnesses. Reeves contests the adequacy of damages awarded on three levels: (a) quantum of attorney's fees; (b) denial of reimbursement expenses; and (c) computation based on a 60 hour workweek. The Secretary defends jurisdiction and urges a "make whole" back pay award calculated on the basis of a higher projected income than that utilized by the district court. We will address the issues in the sequence provided by IT&T, discussing the Secretary's and Reeve's claims as they logically present themselves.

JURISDICTION

IT&T rests its jurisdictional challenge on the following argument:[7]

(1) In 1967, when the claimant instituted this suit, the Act did not authorize a private right of action for damages for the

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[6] The district court summarized the award in his final order as follows:

Straight time and overtime owed by defendant to plaintiff, plus liquidated damages	$22,164.28
Back pay owed by defendant to plaintiff for years 1967 through 1974	$39,081.46
Attorney's fee	35,000.00

[7] Federal courts have always had "jurisdiction" to provide remedies for retaliatory discharge in actions brought by the Secretary. For this reason, the issue might more accurately have been framed as a challenge to the procedural capacity of the

wrongful discharge of an employee. Standing to raise the section 15(a)(3) violation rested solely with the Secretary of Labor, who did not file suit at that time. *Powell* v. *Washington Post Co.*, 267 F.2d 651 (D.C.Cir.1959).

(2) From the earliest pre-trial stipulation in 1969, the employer has challenged the court's jurisdiction over the unlawful discharge claim. Before April, 1973, the district court limited the scope of his judicial inquiry to a resolution of the exemption issue. For this reason, the employee's challenges to jurisdiction were not lodged in a formal motion to dismiss until after that date. The district court erred in not dismissing the unlawful discharge action in response to the challenges set forth in the pre-trial stipulations and later in the motion to dismiss.

(3) The Secretary first attempted to intervene in August, 1973, four weeks after IT&T moved to dismiss the action and nearly six years after the original complaint was filed. The Secretary was barred from intervening at this time by virtue of the statute of limitations governing actions under section 17 of the Act. Section 17 adopts as a limitation on injunctive proceedings the statutory time bar imposed in section 6 of the Portal-to-Portal Act, 29 U.S.C. §§ 251-262. That section

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employee to bring a private action to remedy an unlawful discharge. Since we merely set forth the argument as it was presented to us in the briefs, we retain IT&T's characterization of the problem as jurisdictional. We have no serious difficulty with the terminology in any event. The critical question in a procedural capacity or standing challenge is whether the plaintiff possesses sufficient status and stake in the outcome "to warrant his invocation of federal-court jurisdiction." *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 260-61, 97 S.Ct. 555, 561, 50 L.Ed.2d 430 (1977); *Singleton* v. *Wulff*, 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976); *Warth* v. *Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). It is not inappropriate, therefore, to assert that a court is without "jurisdiction" to address the claims of a party which lacks the procedural capacity to sue.

limits Secretarial enforcement to within two years after the cause of action accrued, or within three years if the violation was willful. In either case, the Secretary's six year delay in proceeding to enforce the Act was time barred by statute. Even discounting the statute's effect, the Secretary was prohibited by the doctrine of laches from intervening some six years after suit was filed.

(4) Because intervention was untimely, the Secretary's action could not create an independent basis for jurisdiction over the unlawful discharge claim.

(5) With no private right of action available and with no legitimate basis for Secretarial intervention, the district court was without jurisdiction and should have dismissed the unlawful discharge claim in 1973.

(6) The district court's wrongful failure to dismiss in 1973 cannot form the basis for jurisdiction in 1977. Congressional creation of a private right of action in 1977 for recovery under section 15(a)(3) cannot form the basis for jurisdiction. The proposition that a court must apply whatever law is in effect at the time a decision is rendered is inapplicable here. Although the decision was rendered after the amendment creating the private right of action, a correct ruling in 1973 would have forever foreclosed the unlawful discharge clain. The claimant should not be rewarded for the court's erroneous ruling in 1973, which kept viable an otherwise illegitimate claim.

While IT&T's argument is an appealing one, its analysis does not withstand close scrutiny. First, the record does not support IT&T's contention that jurisdiction over the unlawful discharge was challenged in pre-trial stipulations from 1969 to 1971.[8] The only basis for IT&T's position is the general claim appearing in each stipulation that: "plaintiff has no remedy for his discharge." We do not view this as a challenge, informal or otherwise, to Reeves's jurisdictional right to bring his

[8] Our discussion does not contradict the well-established rule that jurisdictional challenges may be raised at any time. Fed.R.Civ.P.

claim for unlawful discharge before the district court. Our reluctance to so construe the phrase is further justified by the recognition that each of the stipulations proclaims that no jurisdictional questions were raised by either Reeves or IT&T.

The jurisdictional challenge to Reeves's unlawful discharge claim was first presented to the district court in the motion to dismiss filed on July 23, 1973. IT&T conceded at oral argument that only when a claim is adequately raised does a trial court have a duty to rule on the challenge. We conclude that the district court had no duty to address the jurisdictional point until after the motion to dismiss was filed in July, 1973.

Having made this determination, we reject IT&T's claim that the Secretary's intervention was untimely. Rule 24(b) of the Federal Rules of Civil Procedure permits "timely" intervention where an applicant's claims contain common questions of law or fact with the main action. By the express terms of Rule 24, motions for permissive intervention are addressed to the sound discretion of the district court. *United States* v. *Marion County School District,* 590 F.2d 146 (5th Cir. 1979); *United States* v. *Allegheny-Ludlum Industries, Inc.*, 553 F.2d 451 (5th Cir. 1977). We will not overturn a determination on intervention absent an abuse of that discretion. *See, Henry* v. *First National Bank of Clarksdale*, 595 F.2d 291 (5th Cir. 1979); *United States* v. *Marion County School District*; *Korioth* v. *Briscoe*, 523 F.2d 1271 (5th Cir. 1975). IT&T insists that by permitting intervention nearly six years after the action was instituted, the district court abused its discretion. An "absolute measure of timeliness," however,

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12(h)(3); *Menchaca* v. *Chrysler Credit Corp.*, 613 F.2d 507 (5 Cir. 1980); *Mansfield, Coldwater & Lake Michigan Railway* v. *Swan,* 111 U.S. 379, 4S.Ct. 510, 28 L.Ed. 462 (1884). We do not question the district court's authority to rule on the jurisdictional challenge at any stage. It is necessary to determine when the claim was first brought before the district court, however, because only when the claim is properly raised does the court have a duty to address the challenge. That determination bears upon a critical issue in this appeal — the timeliness of the Secretary's intervention.

is of little significance in determining the propriety of intervention under Rule 24(b). *Stallworth* v. *Monsanto Co.*, 558 F.2d 257 (5th Cir. 1977); *Diaz* v. *Southern Drilling Corp.*, 427 F.2d 1118 (5th Cir. 1970). We have before recognized that intervention is permissible "months or even years fter the original filing of the suit 'where the substantial litigation of the issues had not been commenced when the motion to intervene was filed.'" *Smith Petroleum Service, Inc.* v. *Monsanto Chemical Co.*, 420 F.2d 1103, 1115 (5th Cir. 1970). Moreover, in exercising its discretion the district court must "put into the balance against the movant its prior opportunities to assert its postion." *United States* v. *Marion County School District*, at 148. In this case, the Secretary moved to intervene shortly after the question of Reeves's standing as a private party to assert the unlawful discharge claim was put in issue by IT&T's formal motion to dismiss. IT&T has not demonstrated that the intervention caused undue delay or prejudice in the federal action. *McDonald* v. *E. J. Lavino Co.*, 430 F.2d 1065 (5th Cir. 1970). We conclude that the application for intervention was timely under Rule 24(b), Fed.R.Civ.P.

IT&T also asserts that the Secretary was barred from filing his complaint in intervention under the statutory limitations period set forth in section 6 of the Portal-to-Portal Act and made applicable in 29 U.S.C. § 217. These sections place a maximum three year limitations period on suits to enforce any cause of action "for unpaid minimum wages, unpaid overtime compensation, or liquidated damages" under the Act. *Unexcelled Chemical Corporation* v. *United States*, 345 U.S. 59, 73 S.Ct. 580, 97 L.Ed. 821 (1953). The Secretary's complaint in intervention was limited to the enforcement of a cause of action for Reeves's unlawful discharge under section 15(a)(3) of the Act. He did not seek redress for unpaid overtime compensation or liquidated damages. The limitation provision of section 255 therefore does not apply to the Secretary's action in equity to enforce section 15(a)(3) of the Act. Nor does the doctrine of laches prohibit the Secretary's

intervention. That doctrine does not apply as a defense against agency action to vindicate public rights. *Weiszmann* v. *District Engineer, U.S. Army Corps of Engineers*, 526 F.2d 1302 (5th Cir. 1976); *United States* v. *State of Florida*, 482 F.2d 205 (5th Cir. 1973); *Chromcraft Corp.* v. *EEOC*, 465 F.2d 745 (5th Cir. 1972).

Finally, we reject IT&T's contention that the 1977 amendments did not extend to Reeves a private right to action for unlawful discharge. Private actions for discriminatory discharge were denied in this circuit prior to the amendment to section 216(b). *See, Martinez* v. *Behring's Bearings Service, Inc.*, 501 F.2d 104 (5th Cir. 1974). In 1977, however, that section was amended to authorize private suits for unlawful discharge "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." The question we must answer is whether passage of the amendment during the pending action operated to extend to Reeves a private right of action which he did not have at the outset of his suit. In resolving the issue, we find persuasive the reasoning of the Sixth Circuit in *Bush* v. *State Industries, Inc.*, 599 F.2d 780 (6th Cir. 1979). In *Bush*, an employee's pre-amendment action for retaliatory discharge was dismissed in district court for failure to state a claim upon which relief could be granted. Subsequent to the filing of Bush's appeal with the circuit court, Congress amended the Act to provide a private right of action for violations of section 15(a)(3). Citing the "well-established principle" that, barring manifest injustice or express statutory proscription, "a court is to apply the law in effect at the time it renders its decision," the court held the 1977 amendments applicable to Bush's pending case. *Bush* v. *State Industries, Inc.*, at 786; *Bradley* v. *School Board of the City of Richmond*, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974). The court in *Bush* summarized its holding as follows:

> When § 16(b) of the Act was amended, subsequent to the filing of this action by Bush, it created a private cause of action for enforcement of the rights protected by

> § 15 of the Act. Applying the law in effect at the time of our decision, we hold that Bush has an express right to maintain this cause of action. Thus, any question as to whether an implied right of action existed was mooted by the 1977 amendments to the Act.

599 F.2d at 787.

We apply the same rationale to hold that Reeves is entitled to seek redress under section 15(a)(3), where the Act was amended during the pendency of the suit to create a private right of action under section 16(b).[9] We further observe, as did the court in *Bush*, that amendments such as those to section 16(b), which are procedural and affect only remedies, are generally applicable to pending cases. *Bush* v. *State Industries Inc.*; *Mahroom* v. *Hook*, 563 F.2d 1369 (9th Cir. 1977); *United States* v. *Blue Sea Line*, 553 F.2d 445 (5th Cir. 1977); *see Pedreyra* v. *Cornell Prescription Pharmacies, Inc.*, 465 F.Supp. 936 (D.C.Colo.1979).

II. EXEMPTION

For the reasons set forth in the district court's thorough analysis on this issue, we reject IT&T's claim that Reeves should have been adjudicated an exempt employee under 29 U.S.C. § 213(a)(1). *See, Reeves* v. *International Telephone & Telegraph Corp.*, 357 F.Supp. 295 (W.D. La.1973).

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[9] IT&T argues that this case is distinguishable from *Bush*, because here the statutory period had run prior to the amendments. This identical claim, however, was raised and rejected in *Bush*. There, the court held that the existence of federal subject matter jurisdiction under 28 U.S.C. §1333 eliminated the limitations problem by tolling the statute upon filing of the claim. Our determination that the statutory period of 29 U.S.C. §255 does not apply to the Secretary's claim under section 15(a)(3), renders unnecessary a decision on the federal subject matter issue.

III. UNLAWFUL DISCHARGE

We find adequate evidence in the record to support the district court's determination that Reeves was discharged in retaliation for the filing of his complaint for alleged overtime violations with the Department of Labor. During his employment Reeves had complained regularly to supervisors and colleagues about not being properly compensated for overtime work. In 1967, IT&T established a policy prohibiting payment, including compensation at straight time rates, for overtime work. Although Reeves had been given excellent evaluations and fitness reports,[10] IT&T discharged him for "poor performance" the day after he lodged his complaints with the Wage and Hour Division of the Department of Labor. The record shows that IT&T had been apprised of Reeves's wage complaint with the Department of Labor. Having reviewed the factual basis for the finding of unlawful discharge we have no definite and firm conviction that a mistake was committed. We therefore affirm on this issue. Rule 52(a), Fed.R.Civ.P., *Inter-Cities Navigation Corp.* v. *United States*, 608 F.2d 1079 (5th Cir. 1979); *Stegmaier* v. *Trammell*, 597 F.2d 1027 (5th Cir. 1979).

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[10] The following excerpts from written performance evaluations are illustrative of the appraisals Reeves received from supervisors during his employment at IT&T.

For the period ending July 7, 1966:

> Mr. Reeves' technical knowledge and ability has proven to be excellent and he has batted 1,000 on his complaints and reports. . . . In my opinion, Mr. Reeves is the best RF man we have within our organization. This opinion is shared by . . . [the] most senior microwave systems man.

For the period from 1967 to May 1968:

> Mr. Reeves' performance on this project has been characterized by others as being one of very high efficiency. . . . Mr. Reeves continues to be one of the most capable RF individuals within the installation and service organization.

IV. DAMAGES AWARD

Unpaid Wages.

Under the Act, an employee who brings suit for unpaid overtime compensation bears the burden of proving, with definite and certain evidence, that he performed work for which he was not properly compensated. *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946); *Marshall* v. *Dallas Independent School District*, 605 F.2d 191 (5th Cir. 1979); *Johnson* v. *Dierks Lumber & Coal Co.*, 130 F.2d 115 (8th Cir. 1942). Inaccurate wage and hour information, however, is not always fatal to a claim for minimum wage or overtime compensation under the Act. Where the inaccuracy is due to the employer's failure to keep adequate records as required by statute,[11] imprecise evidence on quantum can provide a "sufficient basis" for damages. *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. at 687, 66 S.Ct. at 1192; *Marshall* v. *Mammas Fried Chicken, Inc.*, 590 F.2d 598 (5th Cir. 1979); *Hodgson* v. *Jones*, 434 F.2d 1061 (5th Cir. 1970). Under these circumstances, we have "in effect ordered the fact finder to do the best he could in assessing damages." *Mitchell* v. *Riley*, 296 F.2d 614, 616 (5th Cir. 1961). As the Supreme Court observed in *Anderson* v. *Mt. Clemens Pottery Co.*:

The solution . . . is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result

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[11] 29 U.S.C. §211(c) provides as follows:

Every employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or orders thereunder.

would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act. In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

328 U.S. at 687-688, 66 S.Ct. at 1192.

The unpaid wages awarded by the fact finder in this case reflect a conscientious adherence to the rule enunciated in *Anderson* v. *Mt. Clemens*. The record supports the magistrate's finding that IT&T did not keep adequate records and that employees were ordered to report incomplete and deflated figures on overtime hours. Moreover, IT&T failed to produce any pertinent records in accordance with discovery orders for certain periods in 1967.

Reeves introduced what he termed a "running total" of hours worked that he apparently kept in his mind during his employment. According to Reeves, he worked approximately 3100 uncompensated hours for IT&T. From this figure, Reeves estimates an average workweek of 74.5 hours. Reeves first testified to the running total in 1973. At that time, he conceded that the totals corresponded to the rough computations of his subconscious mind. Expressly cognizant of his duty under the circumstances to premise an award "upon as close an approximation as possible," the fact finder based his

calculations on an average workweek of 60 hours.[12] We are satisfied that the 60 hour workweek represents a fair and "just" approximation under the facts presented and within the guidelines for determination observed in other inadequate company records cases. *See, Anderson* v. *Mt. Clemens*; *Mitchell* v. *Riley*; *Mitchell* v. *Mitchell Truck Line, Inc.*, 286 F.2d 721 (5th Cir. 1961). For this reason, we reject Reeves's and IT&T's claim that the resulting unpaid overtime award was clearly erroneous. *See, Weisel* v. *Singapore Joint Venture, Inc.*, 602 F.2d 1185 (5th Cir. 1979); *Bunn* v. *Central Realty of Louisiana*, 592 F.2d 891 (5th Cir. 1979).

Liquidated Damages.

Citing its alleged good faith belief that Reeves was an exempt employee under 29 U.S.C. §213(a)(1), IT&T argues that there is no basis for the additional assessment of liquidated damages under section 216(b) of the Act. We disagree. Section 11 of the Portal-to-Portal Act, imposes upon an employer seeking to escape liquidated damages the plain and substantial burden of proving that its violation was "both in good faith and predicated upon such reasonable grounds that it would be unfair to impose upon him more than a compensatory verdict." *Barcellona* v. *Tiffany English Pub. Inc.*, 597 F.2d 464, 468 (5th Cir. 1979). IT&T has not offered sufficient evidence to demonstrate that its failure to pay overtime wages in accordance with the Act was in reasonable good faith. As decisions have shown, the presumption of willfullness stands, absent positive and compelling proof of good faith. It is not enough, for instance, to plead and prove ignorance of the wage requirements. Knowledge will generally be imputed to

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[12] The average 60 hour workweek computed over Reeves's term of employment resulted in a total of 2,360 overtime hours, 966 of which were compensated by IT&T at the undisputed straight time rate. When the additional overtime wages ($2.15) are added for those 966 hours and the full time and a half rate ($6.46) is calculated for the remaining 1,394 overtime hours, this results in a total unpaid overtime damages award of $11,082.14.

the offending employer. *Marshall* v. *A & M Consolidated Independent School District*, 605 F.2d 186 (5th Cir. 1979). Nor does the complete ignorance of the possible applicability of the Act shield the employer from liability for liquidated damages. *Coleman* v. *Jiffy June Farms, Inc.*, 458 F.2d 1139 (5th Cir. 1972). Good faith requires some duty to investigate potential liability under the Act. *Barcellona* v. *Tiffany English Pub., Inc.*.

Lack of good faith is demonstrated when an employer "knows, or has reason to know, that his conduct is *governed by* the [Act]." *Brennan* v. *Heard*, 491 F.2d 1, 3 (5th Cr. 1974). Because we find substantial evidence to conclude that IT&T "knew or suspected that [its] actions might violate the [Act]," we uphold the district court's award of liquidated damages.[13] *Coleman* v. *Jiffy June Farms*, at 1142; *Pearce* v. *Wichita County, City of Wichita Falls, Texas, Hospital Board*, 590 F.2d 128 (5th Cir. 1979).

Back Pay Award.

Reeves decries the failure of the district court to add to his projected annual earnings an amount equivalent to the $980 per month he received as reimbursed expenses during his period at IT&T. According to Reeves, reimbursements constitute recoverable wages under 19 U.S.C. §203(m). That section defines "wages" to include the reasonable cost of furnishing board, lodging, or other facilities if they are customarily furnished by the employer to his employees. We

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[13] The fact finder was justified in concluding from a number of factors that IT&T knew or should have known it was violating the overtime provisions of the Act. These factors include: the company's instructions not to report overtime hours; the willful discharge of Reeves; supervisors' statements that employees would have to realize they would be working uncompensated overtime hours; and the uncooperativeness of IT&T during discovery. Additionally, as the district court aptly concluded and as we have so held, Reeves was not an exempt employee under the Act.

construe this section to apply to employer furnished facilities, and not to reimbursed out-of-pocket personal expenses incurred by employees during their business travels. 29 U.S.C. § 207(e)(2).[14]

In calculating annual earnings, the court based its figure of $15,683.20 on Reeves's average hourly rate ($4.31) during his employment with IT&T. The Secretary argues that the calculation should have been based on the hourly wage Reeves was making upon termination. The Secretary also asserts that the back pay award is inadequate because the district court failed to consider probable pay increases for the years 1967-1975.

We agree with the Secretary that in order to reasonably restore the employee "to the same situation he would have occupied if he had not been discharged," the award must be based on the rate of pay Reeves was receiving upon termination. *Goldberg* v. *Bama Manufacturing Corp.*, 302 F.2d 152, 156 (5th Cir. 1962). The district court did not abuse its discretion, however, in refusing to consider possible pay increases from 1967 to 1975. Because of the speculative nature of that determination, we believe it rested within the sound exercise of the district court's discretion "to decide what measure of damages is appropriate." *Id.* at 156; *Mitchell* v. *Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 80 S.Ct. 332, 4 L.Ed.2d 323 (1960); *Mitchell* v. *Goodyear Tire & Rubber Co.*, 278 F.2d 562 (8th Cir. 1960).

With an average hourly rate of $4.57, the back pay award is increased to $46,620.65. Section 16(b) of the Act now authorizes an additional equal amount as liquidated

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[14] Under section 207(d)(2) of the Act, as amended in 1974, the "regular rate" of an employee does not include "reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment."

damages, bringing the total back pay and liquidated damages award to $93,241.30.

Reinstatement.

IT&T argues that reinstatement is a remedy "wholly outside the purview of the Fair Labor Standards Act." As the Supreme Court observed in *Robert De Mario Jewelry*, however, reinstatement and reimbursement may properly be combined to provide a complete judicial remedy, where an employee has been the victim of an unlawful discharge under section 215(a). *See, Goldberg* v. *Bama Manufacturing Corporation*. Reinstatement is an appropriate remedy for unlawful discharge under the Act.

Attorney's Fees.

Section 16(b) of the Act provides that in any action successfully brought under its provisions, the court shall "allow a reasonable attorney's fee to be paid by the defendant." In accordance with this section, the district court awarded attorney's fees in the amount of $35,000. According to Reeves, this sum is woefully inadequate to properly compensate his attorney for the nearly 3,000 hours he claims to have spent on the case throughout its thirteen year federal court history. Reeves argues that his attorney is entitled to at least $50 an hour, an amount bringing his total attorney's fee claim to $150,000. We find no basis upon which to alter the district court's award. The attorney's fee determination rests in the sound discretion of the district court and will not be overturned in the absence of abuse. *Baxter* v. *Savannah Sugar Refining Corp.*, 495 F.2d 437 (5th Cir. 1974); *Montalvo* v. *Tower Life Building*, 426 F.2d 1135 (5th Cir. 1970). Although it is well-established that a district court need not take evidence concerning the value of attorney's services, the fact finder considered evidence presented by Reeve's attorneys on the length and complexity of their representation. *Montalvo* v. *Tower Life Building; Day & Zimmerman, Inc.* v. *Reid*, 168 F.2d 356 (8th Cir. 1948); *Campbell* v. *Green*, 112 F.2d 143 (5th Cir. 1940). As the magistrate's recommended order il-

lustrates, the determination rested on factors recognized as critical in the assessment of attorney's fees in *Johnson* v. *Georgia Highway Express*, 488 F.2d 174 (5th Cir. 1974). We have recently recognized the applicability of the *Johnson* guidelines in a non-Title VII setting. *Piambino* v. *Bailey*, 610 F.2d 1306 (5th Cir. 1980). The district court entered its award after considering the time and labor required, the complexity involved, and the skill necessary to properly perform the services needed. *See, Johnson*, at 718-719. As we observed in *Montalvo*, "[a] trial court has firsthand knowledge of the proceedings" and is in a uniquely qualified position to "place a value on [the attorney's] services." 426 F.2d at 1150. We affirm the district court's $35,000 award of attorney's fees.

We think an additional fee of $5,000 for this appeal is merited, and increase the award to $40,000 in accordance with our authority to make such an assessment. *See Montalvo*; *Bable* v. *T. W. Phillips Gas & Oil Co.*, 287 F.2d 21 (3rd Cir. 1961); *Holtville Alfalfa Mills, Inc.* v. *Wyatt*, 230 F.2d 398 (9th Cir. 1955).

Conclusion.

We summarize the damages award as redetermined by this decision as follows:

Straight time and overtime owed by defendant to plaintiff, plus liquidated damages	$22,164.28
Back pay owed by defendant to plaintiff for years 1967 through 1974, plus liquidated damages	93,241.30
Attorney's fee	40,000.00
Total award	$155,404.58

V. EXCLUSION OF CERTAIN WITNESSES

The record discloses that on August 22, 1973, counsel for IT&T met for three hours with at least eleven prospective witnesses and discussed the case in preparation for testimony at the quantum hearing. The meeting and discussion constituted a direct and flagrant violation of a previously entered sequestration and separation order. The determination as to

whether a violating witness shall be permitted to testify "is generally left to the sound discretion of the trial court." *United States* v. *Suarez*, 487 F.2d 236, 238 (5th Cir. 1973); *United States* v. *Moriarty*, 497 F.2d 486 (5th Cir. 1974). "[P]articular circumstances" support exclusion of testimony where the violation occurred with the "consent, connivance, procurement or knowledge" of counsel. *Holder* v. *United States*, 150 U.S. 91, 92, 14 S.Ct. 10, 37 L.Ed. 1010 (1893); *Braswell* v. *Wainwright*, 463 F.2d 1148, 1156 (5th Cr. 1972); *United States* v. *Schaefer*, 299 F.2d 625 (7th Cir. 1962). In light of the willful nature of the violation on the part of the witnesses and counsel, we do not overturn the district court's order prohibiting any testimony from the violating witnesses. *Holder* v. *United States*; *United States* v. *Torbert* 496 F.2d 154 (9th Cir. 1974); *United States* v. *Eastwood*, 489 F.2d 818 (5th Cir. 1973).

The district court judgment for immediate reinstatement is AFFIRMED, and the damages award is increased in accordance with this decision.

Appendix B

29 U.S.C. §216(b)

(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additonal equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

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29 U.S.C. §203(m)

(m) "Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees: *Provided*, That the cost of board, lodging, or other facilities shall not be included as a part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective bargaining agreement applicable to the particular employee: *Provided further*, That the Secretary is authorized to determine the fair value of such board, lodging, or other facilities for defined classes of employees and in defined areas, based on average cost to the employer or to groups of employers similarly situated, or average value to groups of employees, or other appropriate measures of fair value. Such evaluations, where applicable and pertinent, shall be used in lieu of actual measure of cost in determining the wage paid to any employee. In determining the wage of a tipped employee, the amount paid such employee by his employer shall be deemed to be increased on account of tips by an amount determined by the employer, but not by an amount in excess of 40 per centum of the applicable minimum wage rate, except that the amount of the increase on account of tips determined by the employer may not exceed the value of tips actually received by the employee. The previous sentence shall not apply with respect to any tipped employee unless (1) such employee has been informed by the employer of the provisions of this subsection, and (2) all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.

29 C.F.R. § 778.217

§778.217 Reimbursement for expenses.

(a) *General Rule.* Where an employee incurs expenses on his employer's behalf or where he is required to expend sums

solely by reason of action taken for the convenience of his employer, section 7(e)(2) is applicable to reimbursement for such expenses. Payments made by the employer to cover such expenses are not included in the employee's regular rate (if the amount of the reimbursement reasonably approximates the expenses incurred). Such payment is not compensation for services rendered by the employees during any hours worked in the workweek.

(b) *Illustrations.* Payment by way of reimbursement for the following types of expenses will not be regarded as part of the employee's regular rate:

(1) The actual amount expended by an employee in purchasing supplies, tools, materials, or equipment on behalf of his employer.

(2) The actual or reasonably approximate amount expended by an employee in purchasing, laundering or repairing uniforms or special clothing which his employer requires him to wear.

(3) The actual or reasonably approximate amount expended by an employee, who is traveling "over the road" on his employer's business, for transportation (whether by private car or common carrier) and living expenses away from home, other travel expenses, such as taxicab fares, incurred while traveling on the employer's business.

(4) "Supper money", a reasonable amount given to an employee, who ordinarily works the day shift and can ordinarily return home for supper, to cover the cost of supper when he is requested by his employer to continue work during the evening hours.

(5) The actual or reasonably approximate amount expended by an employee as temporary excess home-to-work travel expenses incurred (i) because the employer has moved the plant to another town before the employee has had an opportunity to find living quarters at the new location or (ii) because the employee, on a particular occasion, is required to report for work at a place other than his regular workplace.

The foregoing list is intended to be illustrative rather than exhaustive.

(c) *Payments excluding expenses.* It should be noted that only the actual or reasonably approximate amount of the expense is excludable from the regular rate. If the amount paid as "reinbursement" is disproportionately large, the excess amount will be included in the regular rate.

(d) *Payments for expenses personal to the employee.* The expenses for which reimbursement is made must in order to merit exclusion from the regular rate under this section, be expenses incurred by the employee on the employer's behalf or for his benefit or convenience. If the employer reimburses the employee for expenses normally incurred by the employee for his own benefit, he is, of course, increasing the employee's regular rate thereby. An employee normally incurs expenses in traveling to and from work, buying lunch, paying rent, and the like. If the employer reimburses him for these normal everyday expenses, the payment is not excluded from the regular rate as "reimbursement for expenses." Whether the employer "reimburses" the employee for such expenses or furnishes the facilities (such as free lunches or free housing), the amount paid to the employee (or the reasonable cost to the employer or fair value where facilities are furnished) enters into the regular rate of pay as discussed in § 778.116. See also § 531.37(b) of this chapter.

29 U.S.C. § 207(e)(2)

(e) As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include —

(1) sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency;

(2) payments made for occasional periods when no work is performed due to vacation. holiday, illness, failure of the

employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interest and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment;

(3) sums paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Administrator set forth in appropriate regulations which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees (as such talent fees are defined and delimited by regulations of the Administrator) paid to performers, including announcers, on radio and television programs;

(4) contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees;

(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) of this section or in excess of the employee's normal working hours or regular working hours, as the case may be;

(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays,

or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days; or

(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under section (a) of this section,[1] where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek.

Supreme Court, U. S.
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No. 80-443

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HEWETT M. REEVES, *Petitioner,*

v.

INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION, *Respondent.*

RAY MARSHALL, Secretary of Labor, United States Department of Labor, *Intervenor.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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PETITIONER'S ANSWER TO RESPONDENT'S OPPOSITION

LEROY H. SCOTT, JR.
MECOM & SCOTT
310 Ricou Brewster Bldg.
Shreveport, LA 71101
(318) 425-4433

Attorney of Record for Petitioner

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-443

HEWETT M. REEVES, *Petitioner,*

v.

INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION, *Respondent.*

RAY MARSHALL, Secretary of Labor, United States Department of Labor, *Intervenor.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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APPLICANT'S REPLY TO RESPONDENT'S OPPOSITION

May It Please The Court:

Respondent's opposition, which does not comply with Rule 28.1, seeks to distort the situation. It is ITT that is trying to argue with the facts as found by the Fifth Circuit. This is particularly obvious in connection with the treatment of fringe benefits under 29 U.S.C. 203(m) which involves applicant's first question presented for review.

(1) Personal expenses v. expenses on employer's behalf.

ITT argues the $980.00 per month ($3.77 per hour) constitutes expenses incurred on the employer's behalf[1] where the Court of Appeal clearly stated these expenses were for "travel, lodging, eating and OTHER PERSONAL EXPENSES. . . ." (emphasis ours), application, appendix pg. 2a. The language is clear — the court declared these to be personal stating simply that they were not includable because "reimbursed" rather than "furnished", thus creating the loophole. Application, appendix page 23a.

(2) Secretary of Labor as a non-applicant.

Respondent would like to benefit from its argument that the Secretary did not seek certiorari. This ignores the whole thrust of the opinion that plaintiff can now present these matters for himself without having to go through the Secretary. Application, appendix p. 14a et seq.

(3) Review of law sought, not facts.

We do not seek reviews of facts, we seek the proper application of the law to the facts as found.

A. 29 U.S.C. 203(m).

This section of the law explicitely includes "board, lodging, or other facilities."

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[1] Complete expense reports in the record reveal that the $980.00 per month constituted only about one-half of the total reimbursements to plaintiff. Mr. Reeves had extracted the personal expenses and testified only as to these. This portion of the record has already been forwarded to this Court.

B. Employee should be made whole.

Mitchell v. *DeMario Jewelry, Inc.*, 361 U.S. 288, expresses this Court's view that an employee should be made whole and not faced with a "Hobson's choice."

C. Attorney fees.

Whether plaintiff's attorney received an adequate fee is patently not an issue. Whether the fee allowed by the Court was so small as to discourage able counsel from undertaking representation in this type of case is an issue as the public rights would not be vindicated thereby. The test of *Newman* v. *Piggy Park Enterprises, Inc.* 390 U.S. 400 has not been met when $35,000.00 is awarded for over 2,000 hours of representation extending over more than 12 years. In such a case, the "discretion" was not "sound."

D. Calculation of liquidated damages.

The resolution of the important question of method of calculation of liquidated damages on lost wages should certainly not be deferred until "an appellate court should rule in accordance with petitioner's advocated interpretation." The exercise of this Court's jurisdiction is called for when the lower Courts rule incorrectly, as in the case at bar. This is definitely an important question of Federal Law which has not been but should be ruled on by this Court.

CONCLUSION

We respectfully submit the application should be granted for the reasons cited in the application and in this reply.

Respectfully submitted,

LEROY H. SCOTT, JR.
MECOM & SCOTT
310 Ricou Brewster Bldg.
Shreveport, LA 71101
(318) 425-4433

Attorney of Record
for Petitioner

CERTIFICATE

I do hereby certify that a copy of the above and foregoing has been mailed to opposing counsel, Cook, King, Yancey and Galloway, 600 Commercial National Bank Building, Shreveport, Louisiana 71101 on this th day of December, 1980.

LEROY H. SCOTT, JR.